IN THE

Supreme Court of the United States

October Term, 1976

No. 76-543

IN RE: CBS LICENSING ANTITRUST LITIGATION
RECORD CLUB OF AMERICA, INC.,
Petitioner,

VS.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

IN RE: CBS LICENSING ANTITRUST LITIGATION
RECORD CLUB OF AMERICA, INC.,
Petitioner,

VS.

A & M RECORDS, *et al.*,
Respondents.

IN RE: CBS LICENSING ANTITRUST LITIGATION
RECORD CLUB OF AMERICA, INC.,
Petitioner,

VS.

KINNEY SERVICES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinion of the District Court, reproduced in Appendix A, has not been officially reported; neither has the opinion of the Court of Appeals, reproduced in Appendix B.

Jurisdiction

The decision of the Court of Appeals, affirming the order of the District Court dismissing the above-entitled antitrust actions, was entered on July 2, 1976 and judgment was entered on July 2, 1976. An order dated October 6, 1976 granted an extension of time within which to file a petition for writ of certiorari to and including October 18, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a district court could refuse to allow a plaintiff to respond to interrogatories by invoking the business records option outlined in Fed.R.Civ.P. Rule 33(c) ("Rule 33(c)") in the absence of an express finding: (a) that the answers to such interrogatories could not be derived from the specified business records and/or (b) that the burden of research would not be substantially the same for the party serving the interrogatories as for the party served.

2. Whether a plaintiff should be afforded relief from the consequences of a district court's refusal to allow it to utilize Rule 33(c) when: (a) such refusal was apparently based on the affidavits of two accountants (retained by a defendant) who "were unconvinced that the information called for in the interrogatories could be compiled" (16a) from those books and records of the plaintiff

they had reviewed, but who did not state that they reviewed the documents identified by plaintiff in its election under Rule 33(c), and (b) one such accountant, in conjunction with the accounting firm of which he is a partner, later compiled comparable information from those books and records of the plaintiff identified in plaintiff's election.

3. Whether in a big antitrust case huge corporate defendants should be permitted to overburden a very small corporate plaintiff with discovery requirements so burdensome and costly as to prevent the cases from ever being heard on their merits when, in accordance with its objective, Rule 33(c) could be utilized to shift the burdens of such discovery to the beneficiaries thereof.

4. Whether a district court erred in dismissing an action on the basis of the plaintiff's alleged failure to comply with discovery orders in coordinated, but not consolidated actions.

Rules and Statute Involved

Fed. R. Civ. P. Rule 33(c) provides as follows:

> "Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable oppor-

tunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

28 U.S.C. § 1407(a) provides, in relevant part:

"When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

Fed. R. Civ. P. Rule 37(b)(2)(C) provides, in relevant part:

"(2) *Sanctions by court in which action is pending.* If a party . . . fails to obey an order to provide or permit discovery . . ., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

"(C) An order . . . dismissing the action or proceeding . . ."

Statement of the Cases

CBS Case

In May 1968 Petitioner ("RCOA") a small privately-owned company, filed a complaint against Columbia Broadcasting System, Inc. and a number of companies (collectively, "CBS") engaged in the distribution of phonograph records and tapes, alleging that the exclusive licenses for club use granted to Columbia Broadcasting System, Inc. by the record manufacturers violated the Sherman Act,

Clayton Act as amended by the Robinson-Patman Act, and Federal Trade Commission Act. The complaint alleged that because such licenses were exclusive, RCOA could not obtain similar licenses and was forced to purchase the same phonograph records and tapes from distributors, manufacturers and others at prices substantially higher than the cost it would have had to incur if it had obtained licenses similar to those of Columbia Broadcasting System, Inc. In November of 1970, Columbia Broadcasting Systems, Inc. signed an agreement with the F.T.C. containing an order to cease and desist from entering into or maintaining any such exclusive license agreements.

In May of 1971, CBS filed and served its initial interrogatories to RCOA requesting, among other things, detailed information regarding RCOA's costs in obtaining those records and tapes Columbia Broadcasting System, Inc. obtained under the alleged exclusive licensing arrangements ("cost interrogatories"). At first RCOA filed objections to the interrogatories in toto. However, later, in response to the Court's denial of its objections, in April of 1972 RCOA answered the interrogatories by invoking the option set forth in Rule 33(c), specifying the documents containing the answers and establishing that the burden of compiling those answers would be substantially the same by affidavit of RCOA's then Director of Auditing. On September 8, 1972, CBS moved to compel further answers to its interrogatories and on November 17, 1972, the District Court orally granted CBS's motion.

The Court had simply "rejected" RCOA's election of its option, without finding either that: (a) the answers to such interrogatories could not be derived from the specified business records or (b) that the burden of research would not be substantially the same for both parties. At the time of such rejection, the Court had the above-

described affidavit specifically representing that it was possible to "calculate the costs of records, tapes and merchandise" to RCOA *from the documents specified therein,* consisting of invoice and voucher records. The Court also had the 1971 affidavits of two accountants retained by CBS, Messrs. Gilbert and Strauss, in which, without identifying the documents they had reviewed, they stated that on the basis of *the documents they reviewed,* it was not possible to calculate such costs. They did not assert that they had reviewed RCOA's invoices and/or vouchers, the documents specified by RCOA. Furthermore, CBS did not offer any testimony of the two other accountants retained by CBS who had seen RCOA's invoices and vouchers. In addition, the Court, of course, did not know that after the submission of Mr. Strauss' affidavit, he, in conjunction with the accounting firm of which he is a partner, Prager & Fenton, would, on behalf of other record industry clients, make calculations from RCOA's books and records comparable to those Mr. Strauss swore, on behalf of CBS, he did not think could be made. (See Appendices C and D, starting at 60a.)

Thus, the District Court, which made no reference to RCOA's Rule 33(c) election in its decision, issued an order granting CBS' motion to compel answers and imposing upon RCOA the costs of providing the answers. As a result, RCOA set out to compile the "required" information. Doing so, however, proved to be the "mammoth" burden RCOA's Director of Auditing had said it would be. Gathering the information involved hiring more than forty special clerks to code information, which, to save money, was keypunched by a large, specially-hired staff in Ireland. That "discovery" project, alone, cost RCOA in excess of $100,000, exclusive of legal fees and expenses, an amount equal to approximately 10% of RCOA's tangible net worth even during its most financially healthy period.

Despite the oppressive burden, RCOA filed its answers to CBS' cost interrogatories in April of 1974. Such answers consisted of some 9,000 pages, constituting 10 volumes of computer print-outs. In June 1974 CBS objected to such answers and, consequently, in November 1974 RCOA was ordered to provide further answers in order to identify the listed phonograph records by certain prefix digits, in addition to the manufacturers' names and catalog numbers already provided, in order to distinguish monaural from stereo recordings. Thereafter, RCOA's president personally filled in the prefix digits by hand; in addition, RCOA offered to stipulate that *all* recordings could be considered as monaural or any type of sound reproduction that would be most favorable to CBS.

On December 23, 1974, drained by the more than one million dollars RCOA had spent prosecuting these antitrust cases, RCOA filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. The next day, RCOA filed a motion to stay all proceedings in light of its Chapter XI filing; the motion was denied.

In January 1975 CBS moved to dismiss the complaint on the ground that RCOA had failed to comply with its discovery requests, alleging that much of the requested prefix information was either omitted (despite RCOA's offered stipulation) or erroneous and that other (non-cost) interrogatories had not been answered sufficiently. No hearing was held. Nevertheless, on May 28, 1975 the District Court issued a Memorandum and Order dismissing the antitrust action with prejudice under Rule 37(b)(2)(C).

A & M and Kinney Cases

In January 1971, the Judicial Panel on Multidistrict Litigation transferred, under 28 U.S.C. §1407, an action brought by RCOA in the United States District Court for

the Southern District of New York against a number of record manufacturers (collectively, "A & M") who had exclusive license agreements with CBS, but who were not defendants in the CBS Case. That case, the A & M Case, was based on the same allegations as the CBS Case.

In November, 1971 the Judicial Panel on Multidistrict Litigation transferred, under 28 U.S.C. §1407, an antitrust action brought by RCOA in the United States District Court for the Southern District of New York against Kinney Services, Inc. ("Kinney"). That case (the "Kinney Case"), also sought relief from violations of the Sherman Act and Clayton Act. However, unlike the allegations contained in the complaints in the CBS and A & M Cases, the Kinney Case alleges that Kinney made unlawful corporate acquisitions and thereby achieved a dominant position in the record and tape industry, and eliminated competition in the distribution of records and tapes by causing the companies it acquired to establish an exclusive distribution subsidiary in place of independent competing distributors who previously fulfilled that function.

A & M served RCOA with interrogatories which were virtually the same as CBS' cost interrogatories, except that they covered a different period. Kinney served RCOA with interrogatories which also dealt with RCOA's unit cost of acquiring records and tapes. RCOA answered the A & M and Kinney interrogatories by making available its business records containing the requested dates pursuant to Rule 33(c). As it had with respect to RCOA's exercise of its election pursuant to Rule 33(c) in the CBS Case, however, the District Court considered RCOA's answering by making its Rule 33(c) election to be no answer, stating in its opinion that, as of July of 1974, "RCOA had not even attempted to answer the interrogatories. . ." (8a).

Thus, rejecting RCOA's Rule 33(c) elections, in November of 1974, the Court ordered RCOA to make further answers with respect to cost interrogatories in the A & M and Kinney Cases, the only discovery order of significance in those cases.

On December 23, 1974, RCOA filed its Chapter XI petition.

On January 7, 1975, RCOA served further answers, on time, with respect to the Kinney Case. Although Kinney contended that the answers were inadequate, Kinney never offered any proof of such contention.

Having been given only 60 days to compile a massive data base for 1969-1973 (a period equal in size to the preceding period covered by CBS' cost interrogatories, the answers which had taken RCOA two years and cost RCOA more than $100,000 to compile), RCOA informed the Court that it lacked sufficient financial resources to answer the A & M interrogatories in a memorandum filed on February 19, 1975.

The District Court dismissed the Kinney and A & M Cases, along with the CBS Case, on the basis of RCOA's alleged willful disobedience of discovery "orders"—the one significant discovery order issued in the A & M and Kinney Cases and the prior discovery orders issued in the CBS Case.

Reasons for Granting the Writ

Rule 33(c) is still fairly new. It is important that it be interpreted and its application be established in accordance with its intended purpose.

1. *The District Court Interpreted and Applied Rule 33(c) Contrary to Its Intended Purpose.*

According to the Notes of the Advisory Committee to Rule 33(c):

> This is a new subdivision, adapted from Calif. Code Civ. Proc. § 2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research of the party who seeks the information. "This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee," Louisell, Modern California Discovery, 124-125 (1963), and alleviates a problem which in the past has troubled Federal courts.

Thus, Rule 33(c) was adopted to avoid requiring a party to engage in burdensome and/or expensive research into its own business records in order to answer an interrogatory; it shifts the burden to the party who seeks the information. See 4A Moore's Federal Practice ¶37.01[6], at 37-13 to 37-19 (1975).

RCOA was obviously the type of party Rule 33(c) was intended to protect. RCOA is a small, private company involved in litigation against huge corporations that can afford top attorneys well-schooled in the sporting theory of litigation. As a result of the District Court's refusal to allow RCOA the protection of Rule 33(c), these huge corporate defendants were able to force RCOA to undertake research so costly that, even after RCOA spent an amount equal to approximately 10% of its tangible net worth trying to meet the discovery requirements imposed

upon it and was forced to file in Chapter XI, the corporate defendants still were not satisfied; they continued to claim their interrogatories had not been sufficiently answered.

Instead of allowing those giant defendant corporations to impose such an unconscionable burden on RCOA, the District Court should have considered RCOA's elections to exercise the option set forth in Rule 33(c) as sufficient answers to the cost interrogatories, as provided in such rule. However, whenever RCOA elected to exercise its option under Rule 33(c), rather than considering such election "a sufficient answer" as provided by the terms of the rule, the District Court considered it "no answer at all." (6a). Instead of interpreting and applying Rule 33(c) in accordance with its intent, without making any finding that either of the two essential factual conditions was not present, the District Court rejected RCOA's elections.

In fact, both requirements of Rule 33(c) were met and the wording of the subdivision, itself, makes it clear that as long as its conditions are met (i.e., the answers can be derived from the specified business records and the burden of research would be the same for both parties), one has a right to utilize Rule 33(c). Thus, Petitioner believes the District Court erred, for it did not make an express determination that either condition was not met, yet it rejected RCOA's exercises of its option under Rule 33(c).

The Court's rejection was of no small consequence. Not only did it force RCOA to spend in excess of $100,000 (exclusive of legal fees and expenses) in response to the CBS cost interrogatories, alone; it also directly led to the dismissal of these three antitrust actions—before they were ever heard on their merits.

2. *The Court of Appeals Has Rendered a Decision in Conflict with the Decision of Another Court of Appeals on the Same Matter.*

The Court of Appeals decision is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Daiflon, Inc.* v. *Allied Chemical Corp.*, 1976—1 Trade Cases ¶60,829 (1976). The fact situation of that case, which is directly on point, is identical to that of the cases considered herein in every material respect. Daiflon, Inc. had brought an antitrust suit against numerous corporations, had been served with a burdensome cost interrogatory, had answered by offering examination of its books and records pursuant to Rule 33(c) which answer did not satisfy the defendants, had been ordered "to answer" the interrogatory, and had tried "to answer" the interrogatory but never managed to satisfy the defendants; the case was eventually dismissed for the plaintiff's alleged failure to adequately respond to the cost interrogatory.

On appeal, the plaintiff argued the trial court had erred in finding its taking of the Rule 33(c) option was not a sufficient answer to the cost interrogatory. Unlike the Court of Appeals in the present cases, however, the Court of Appeals for the Tenth Circuit agreed (even though plaintiff would have had to further identify the relevant records, and even though the defendants argued the burden of ascertaining the information would not be the same for both parties). The Tenth Circuit held that the defendants, the interrogators, had the burden of *proving* the answer to their interrogatory was incomplete and had not done so. The Court mentioned that the extensive research in which the plaintiff had later engaged gave some substance to the plaintiff's claim that a substantially similar burden existed in compiling the answer to the cost interrogatory. The Court went on to say: "Particularly

in view of the subsequent drastic sanction imposed, we believed the trial court erred in determining appellant could not use Rule 33(c) in answering the interrogatory."

The cases at hand are identical to the Daiflon Case in all material respects—but the two Courts of Appeals rendered opposite decisions.

The question of the propriety of RCOA's use of Rule 33(c) came to the District Court via the defendants' motions to compel; the defendants did not prove RCOA's Rule 33(c) answers to the cost interrogatories were incomplete. In fact, neither Kinney nor A & M alleged that the requirements of Rule 33(c) were not met with respect to their cost interrogatories. Furthermore, although CBS alleged the information it requested could not be compiled from the records RCOA specified, the "evidence" it offered consisted of the affidavits described under "Statement of the Cases," supra, which affidavits did not relate to the specified documents; thus, CBS did not prove the requirements were not met.

On the other hand, RCOA's Director of Auditing testified that both conditions were met. Furthermore, the large sum later expended by RCOA in its attempts to satisfy the trial court's discovery orders substantiates the testimony that the cost of research would be the same to the corporate defendants as to RCOA. In addition, the fact that one of CBS' affiants, in conjunction with his accounting firm, later compiled information comparable to that called for by CBS' cost interrogatories from RCOA's financial data in order to support claims made by its clients against RCOA (Appendices C and D, starting at 60a) certainly indicates that such information could be compiled from RCOA's books and records (as does the fact that RCOA was able to compile such information therefrom).

The cases at hand are identical to the Daiflon Case in all material respects; the Courts of Appeals' decisions should have also been identical.

3. *The Court of Appeals Rendered a Decision Which Would Frustrate the Congressional Purpose in Providing for Private Antitrust Litigation.*

The Sherman and Clayton Acts specifically provide for private litigation thereunder, clearly indicating that Congress intended to give private parties the right to protect themselves from violators of those antitrust laws.

That right becomes worse than meaningless, however, if the courts do not help the small plaintiffs, as they try to protect themselves against giant antitrust violators, by affording such litigants the protections provided by law, including the protection encompassed in Rule 33(c). Unless such protections are afforded small plaintiffs, large corporate defendants, employing the sporting theory of litigation, can make a mockery of private antitrust actions, winning such actions by attrition before they go to trial, using the antitrust laws to destroy those who try to protect themselves by bringing private antitrust actions.

RCOA, a small privately-owned company, instituted the antitrust actions at hand in order to protect itself against huge antitrust violators. The cases have never been heard on their merits. After years of litigation, and an investment in excess of one million dollars by RCOA in such litigation, essentially all that has happened is that RCOA, denied the protection of Rule 33(c), has been exhausted by oppressive interrogatories and endless demands for minutiae. Thus, contrary to Congressional intent, RCOA's right to bring private actions under the antitrust laws has not protected RCOA.

The Court of Appeals decision in these cases will not encourage others to seek the protection of the antitrust laws through private litigation. It will, in effect, preclude such private litigation, regardless of the merits of particular complaints, for, at this time, the cases at hand stand for the proposition that (especially in big antitrust cases) "might makes right"; merit is irrelevant, for if you don't start out big enough, your case will never be heard on the merits—your opponents will make sure you run out of money first.

Rule 33(c) was adopted to protect parties like RCOA, parties who cannot afford the costs of meeting endless discovery demands. The District Court was wrong to deny RCOA Rule 33(c)'s protection. To deny small litigants such protections is to deny them their right to protect themselves against antitrust violators.

4. *The Court of Appeals Rendered a Decision Which Violates Plaintiff's Rights to Due Process of Law.*

Although the Kinney Case, like the CBS and A & M Cases, is an antitrust case, as described under "Statement of the Cases" above, the Kinney Case is based upon allegations entirely different from those upon which the CBS and A & M Cases are based. Nevertheless, the District Court hopelessly confused the Kinney Case with the CBS and A & M Cases. Having confused them, as indicated by the District Court and Court of Appeals opinions, the District Court dismissed the Kinney Case because it concluded RCOA had failed to answer interrogatories propounded in the CBS Case in May of 1971—six months prior to the commencement of the Kinney Case! Yet no order of the Multidistrict Panel that transferred the Kinney Case pursuant to 28 U.S.C. § 1407(a), or of the District Court, ever made all prior discovery orders in the CBS and/or A & M Cases applicable to the Kinney Case.

Furthermore, the Multidistrict Panel's order transferring the Kinney Case for pretrial proceedings with the CBS and A & M Cases did not consolidate their pretrial proceedings, and the District Court never entered an order consolidating the pretrial proceedings in those three separate actions. Therefore, the conduct of RCOA in the CBS and A & M Cases could not properly be the basis for dismissal of the Kinney Case.* See *Southern Railway Co.* v. *Templar,* 463 F.2d 97 (10th Cir. 1972) and *In re U.S. Financial Litigation,* 64 F.R.D. 76 (S.D. Cal. 1974).

As stated in the Court of Appeals decision, "only one discovery order of significance to the ruling on dismissal, dated November 1, 1974, was issued in the A & M and Kinney cases" (55a). Although, due to financial difficulties, RCOA did not comply with that order with respect to the A & M Case, RCOA did comply with that order, on time, with respect to the Kinney Case. (Kinney claimed RCOA's response was inadequate, but Kinney never offered any proof of such contention). Thus, dismissal of the Kinney Case under Rule 37(b)(2)(c), or otherwise, was inappropriate.

Even if the District Court had considered the issue of the adequacy of RCOA's response to the November 1, 1974 order with respect to the Kinney Case and found the response inadequate, in light of RCOA's history of timeliness and cooperation with respect to discovery in the Kinney Case, dismissal of the case would have been obviously inappropriate. As indicated in the Court of Appeals decision, the District Court, however, dismissed the Kinney

* Even consolidation, had it been ordered, would "not merge the suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933); *Katz* v. *Realty Equities Corp.*, 521 F.2d 1354, 1358 (2d Cir. 1975); *Greenberg* v. *Giannini,* 140 F.2d 550, 552 (2d Cir. 1944).

Case as punishment for RCOA's alleged conduct in the CBS case.

The imposition of a penalty, as punishment for conduct in another case, violates a litigant's rights to Due Process of Law. As stated by the Fifth Circuit, Rule 37:

> "was designed to empower the court to compel production of evidence by imposition of reasonable sanctions. The court, however, should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior." *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F.2d 858, 860-61 (5th Cir. 1970).

See also Mitchell v. *Johnson,* 274 F.2d 394 (5th Cir. 1960); 4A Moore's Federal Practice ¶37.03[2.1] at pp. 37-56 (1975).

The District Court was clearly erroneous in concluding that the Kinney Case should be dismissed because of RCOA's claimed failure to comply with discovery orders in the coordinated actions.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court grant this petition.

Respectfully submitted,

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APPENDICES

Appendix A

Memorandum and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
MDL DOCKET NO. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION NO. 68-1132
RECORD CLUB OF AMERICA, INC.,

v.

COLUMBIA BROADCASTING SYSTEM, INC.

CIVIL ACTION NO. 71-220
(70 Civ. 2320 S.D.N.Y.)
RECORD CLUB OF AMERICA, INC.,

v.

A & M RECORDS, ET AL.

CIVIL ACTION NO. 72-819
(71 Civ. 5096 S.D.N.Y.)
RECORD CLUB OF AMERICA, INC.,

v.

KINNEY SERVICES, INC., ET AL.

Memorandum and Order

TROUTMAN, J. MAY 20, 1975

This matter comes before the Court on the motions by defendants[1] under Rules 37 and 41, F.R.Civ.P.,[2] to dismiss the actions by reason of the failure of plaintiff, Record Club of America, Inc. (RCOA) to answer interrogatories. This is the fourth time in this action that CBS has moved for a dismissal for failure of RCOA to answer interrogatories. On two prior occasions the Court denied the motions, without prejudice to their renewal in the event of noncompliance and on one occasion the motion to dismiss

[1] Columbia Broadcasting System, Inc. (CBS), A & M Records, Inc., Herb Alpert, Jerome Moss, Caedman Records, Inc., Elektra Corporation, Elektra Sales Corporation, Kinney Services, Inc., and Warner-Elektra-Atlantic Distributing Corp.

[2] Rule 37 of the Federal Rules of Civil Procedure provides, in part:

"Failure to Make Discovery: Sanctions

• • •

"(b) Failure to comply with order.

• • •

"(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

• • •

"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; • • •"

Rule 41(b) provides:

"(b) Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Memorandum and Order

was withdrawn when RCOA at long last supplied certain limited data shortly after the motion was filed.

As more fully appears in this opinion, the Court has given every conceivable latitude to RCOA in an effort to defer and ultimately avoid the severe sanction of dismissal. However, RCOA's disdainful attitude toward the Court's orders, its interminable delay in providing any answers to relevant interrogatories, and its failure to answer fully and completely those interrogatories when it finally chose to act, compel the Court now to grant defendants' motions.

The Court is not unaware of the severity of the sanction, but RCOA has been repeatedly warned that its continued refusal to comply with the Court's orders would inevitably lead to dismissal. We suspect that RCOA's treatment of the repeated orders of this Court is without precedent.

HISTORY OF THE LITIGATION

RCOA began this action or series of actions on May 29, 1968, when it filed a complaint against CBS and a host of phonograph record manufacturers alleging that the exclusive licenses of phonograph records and tapes for club use granted to CBS by the record manufacturers were violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.[3]

RCOA claimed in its complaint, and has alleged throughout the tortuous course of this protracted litigation, that

[3] The Court subsequently dismissed the counts of RCOA's complaint alleging violations of Section 5 of the FTC Act and Section 2(a) of the Robinson-Patman Act. *Record Club of America, Inc.* v. *Columbia Broadcasting System*, 310 F. Supp. 1241 (E.D. Pa. 1970).

because the licenses for club use between CBS and record manufacturers were exclusive, RCOA was unable to obtain similar licenses. As a result, RCOA claimed it was required to purchase the same phonograph records and tapes from distributors, manufacturers and others at prices higher than the cost it would have had to incur if it had obtained licenses similar to those of CBS. Thus, RCOA relies on its alleged higher costs in obtaining finished phonograph records from distributors and others, first to establish the *fact* that it was injured by the exclusive licenses held by CBS and, secondly, to establish the *measure* of its alleged damages.

On January 20, 1971, the Judicial Panel on Multidistrict Litigation transferred, under 28 U.S.C. §1407, an action brought by RCOA in the United States District Court for the Southern District of New York against a number of record manufacturers who had exclusive license agreements with CBS, but who were not defendants in the CBS case pending in Philadelphia.[4] That case was entitled *Record Club of America, Inc.* v. *A & M Records, et al.* On April 19, 1972, a third case brought by RCOA in the Southern District of New York, this against Kinney Services, Inc., and its distribution subsidiary, Warner-Elektra-Atlantic Distributing Corporation, was similarly transferred for coordination with the CBS and A & M cases.[5]

Like the CBS case, the A & M and Kinney cases involve the contention that, because of the exclusive licenses held by CBS, RCOA's cost of acquiring the same phonograph

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[4] *In re CBS Licensing Antitrust Litigation*, 328 F. Supp. 511 (JPML 1971).

[5] *In re CBS Licensing Antitrust Litigation*, 342 F. Supp. 1177 (JPML 1972).

records and tapes as CBS, was higher than would have been the case had RCOA been granted similar licenses.

On May 19, 1971, three years after the institution of this litigation, CBS filed and served its Initial Interrogatories addressed to RCOA. Thus, RCOA was not rushed. The interrogatories requested, among other things, detailed information regarding RCOA's cost of obtaining records and tapes (Interrogatories 1, 2 and 23) under the license agreements it did have (Interrogatory 4), and the conspiracy alleged by RCOA (Interrogatories 13, 14 and 15). RCOA objected to each interrogatory on sundry grounds, but with respect to what have come to be known as the "cost interrogatories" RCOA stated that the information requested was contained in documents which had been produced by RCOA and examined by CBS over an extended period of time.

On September 3, 1971, CBS moved to compel answers to all of its interrogatories and filed supporting affidavits of Richard E. Gilbert and Leo Strauss, two accountants retained by CBS, who had examined RCOA's documents and who stated, under oath, that the documents produced did not contain information from which complete answers to CBS's cost interrogatories could be obtained or compiled. In response, RCOA sought to shift the burden, stating that it was possible to compile the necessary information from the documents produced. It made no effort to compile the information and thus expedite the litigation. Its efforts were devoted to delaying rather than expediting discovery.

After oral argument, the Court, on October 22, 1971, entered an order granting CBS's motion to compel and directing RCOA to answer all interrogatories.

Memorandum and Order

On May 19, 1972, one year after CBS had filed its initial interrogatories and seven months after the Court had directed RCOA to answer, RCOA filed its "answers", which were in large measure no answers at all. As an example of their inadequacy, with respect to the cost interrogatories, RCOA simply made reference to certain kinds of documents and again invited CBS to inspect, audit or copy such documents so that CBS might glean the answers and thus compile its own information subject to RCOA's different interpretation and subsequent attack. In other words, RCOA was attempting to resurrect its original objection to answering the cost interrogatories, a matter the Court had resolved, it thought, on October 22, 1971. RCOA furnished no answers to the conspiracy interrogatories, and no answers to the so-called "damage interrogatories" (Interrogatories 16 and 17), stating that answers would be provided after discovery.

Thereafter on September 8, 1972, CBS again moved to compel answers to most of its interrogatories,[6] but also requested the Court to dismiss the action under Rules 37 and 41 F.R.Civ.P. because of RCOA's failure to answer the interrogatories. This motion was joined in by defendants in the A & M and Kinney cases as well.

At this point in the proceedings, almost four and one-half years after the institution of the CBS action and one year after the Court had directed RCOA to supply answers, the Court would have been fully justified, we think, in dismissing the action. RCOA had simply ignored the order of October 22, 1971, and offered no excuse for noncompliance. Without answers to CBS's cost, damage or conspiracy interrogatories, defendants were unable to conduct meaning-

[6] 1, 2(i-xi), 4(viii, ix, xiia-e, xiii-xiv, xvi, xvii, xix, xx, xxii-xxiv), 5, 6, 9, 11, 13 through 15, 16, 17, 19, 20, 23, 24, 25, 27, 30 and 31.

Memorandum and Order

ful discovery by oral depositions or otherwise and were obviously prejudiced in their preparation for trial. Moreover, RCOA's unwillingness to answer created grave doubts as to whether RCOA could support at trial the contention, central to its case on both liability and damages, that because of the exclusive licenses held by CBS, RCOA was forced to obtain finished records and tapes at a cost higher than CBS's costs for records and tapes, thus allegedly putting RCOA to a competitive disadvantage in the record club business.

Nonetheless, after again hearing argument on the matter, the Court, on November 17, 1972, issued an order granting CBS's motion to compel answers and imposing upon RCOA the cost of providing the answers. The Court, in what could be considered judicial largess, denied defendants' motions to dismiss, "without prejudice to [their] renewal in the event of non-compliance with the order heretofore entered" (Tr. pp. 221-222). To keep the Court informed and to stimulate RCOA's interest, the Court also directed RCOA, because it was familiar with all three cases, to submit monthly status reports on the progress of the coordinated litigation.

For the next year and a half, nothing was done by RCOA to advance its cause. Although counsel for RCOA periodically reported on the status of the preparation of answers to CBS's interrogatories, RCOA's projected completion date was continually pushed back as a result of which, on March 27, 1974, CBS again moved to dismiss. On April 2, 1974, RCOA belatedly filed answers to CBS's "non-cost interrogatories" and on April 8, 1974, RCOA filed answers to the cost interrogatories, the latter of which consisted of volumes of computer print-outs, which purportedly contained the answers to CBS's interrogatories.

On June 25, 1974, CBS withdrew its motion to dismiss and substituted a motion to compel further answers, or in the alternative for an order dismissing the action or precluding the introduction of evidence.[7]

On July 25, 1974, defendants in the A & M and Kinney cases also filed a motion to dismiss or in the alternative to compel answers to interrogatories filed by defendant in those cases.[8] Up to that time RCOA had not even attempted to answer the interrogatories that were the subject of those defendants' motions. In response to interrogatories in the A & M case, RCOA stated that the answers could be derived from certain documents which would be made available for defendant's inspection. In the Kinney cases, RCOA's response to the interrogatories that were filed in January, 1973, one and one-half years prior thereto, was that RCOA was in the process of compiling a "summary" and "analysis" to supplement its answers.

After hearing argument for three days, one day of which was devoted entirely to the testimony of various individuals including the President of RCOA, regarding the adequacy of RCOA's answers to the cost interrogatories,[9] the Court

[7] CBS moved with regard to Interrogatories 1, 2(viii, ix, x, xi), 4(viii, ix, xii(a-e), xiii, xiv, xvi, xix, xx, xxii, xxiii, xxiv), 5, 6, 9, 23(v) and 24.

[8] In the A & M case, defendants moved with respect to Interrogatories 1, 2, 3, 4 and 5 of Set No. 3, which were virtually the same as CBS's cost interrogatories, except they covered the period 1970 through 1973. In the Kinney case, defendants moved with respect to Interrogatories 16(g), 16(i) and 35(d) of Set No. 1, which, again, dealt with RCOA's unit costs of acquiring records and tapes.

[9] The testimony on this point, contained in the transcript of August 2, 1974, conclusively demonstrates that the volumes of computer print-outs did not provide adequate identification of the phonograph records acquired by RCOA. It was thus impossible for defendants to determine RCOA's costs of acquisition. (Tr. pp. 111-112, 119-121, 192, 199-200, 211, 219, 222, 294-296). Sigmund W. Friedman, the President of RCOA, testified at that time that he was unaware that the Court had entered two orders directing RCOA to answer the interrogatories (Tr. pp. 291-292).

found that the answers provided by RCOA to the cost interrogatories (1, 2 and 23) and to the other interrogatories were inadequate. On November 1, 1974, the Court for the third time granted the motion to compel and ordered RCOA to answer CBS's interrogatories within 30 days, and for the second time denied defendants' motions to dismiss, without prejudice.

The Court also denied without prejudice defendants' motion to dismiss in the A & M and Kinney cases, but directed RCOA to answer within 60 days Interrogatories 1 through 5 in the A & M case and Interrogatories 16(g), 16(i) and 35(d) in the Kinney case.

On December 5, 1974, RCOA filed "Plaintiff's Further Answers to Certain CBS' Interrogatories". In response to the cost interrogatories, RCOA referred to 10 volumes of computer print-outs which were lodged with the Clerk, but copies of which were not supplied to CBS or its counsel. The Court subsequently required RCOA to furnish a copy for CBS, but to date this has not been done.[10]

On December 24, 1974, RCOA filed a motion to stay all proceedings in these cases on the grounds that it did "not now have sufficient financial resources to prosecute the above-captioned actions" (Degling Affidavit dated January 15, 1975). In support of that motion, RCOA attached a copy of a petition for arrangement under Chapter XI of the Bankruptcy Act which RCOA had filed in the United

[10] As recently as March 3, 1975, and during the pendency of the present motions to dismiss, RCOA has offered to supply such copy. In the meantime, however, CBS has examined the original of the computer print-out filed in the Clerk's office and found it wanting.

States District Court for the Middle District of Pennsylvania on December 23, 1974. The motion for a stay was denied. RCOA had also requested an extension of one week to file its answers in the Kinney case.

On January 24 and 30, 1975, defendants filed the motions to dismiss which are now before the Court. Defendants claim that RCOA has failed to supply full and complete answers to CBS's Interrogatories 1(iv), 1(xiv), 1(xxi), 1(xxii), 2(viii), 2(ix), 2(x), 2(xi), 4(viii), 4(ix), 4(xii), 4(xiv), 4(xvi), 4(xxiv) and 24. In addition, CBS asserts that the answers provided by RCOA to Interrogatories 1 and a(i)-2(xi) are inaccurate and deficient. As noted, a copy of the answers to Interrogatories 1 and 2(i)-2(xi) were not served upon CBS and CBS's position is based upon an examination of the computer print-out filed with the Clerk (Thurlby Affidavit filed on January 24, 1975).

In the A & M case, no answers were filed by RCOA as required by the order of November 1, 1974, and in the Kinney case, defendants contend the answers are inadequate on their face.

RCOA has, in opposition to CBS's motion to dismiss, admitted its failure to provide further answers to Interrogatories 2(viii), 2(x), 4(viii), 4(ix), and 4(xxi), as required by the Court's order, but now states that it "lacks sufficient present resources to answer the remaining interrogatories in whole or in part" (RCOA Memorandum, p. 2, n. 2, Degling Affidavit filed February 19, 1975, ¶¶2-14). In the A & M case, RCOA states that it lacks sufficient financial resources to answer defendants' interrogatories in any fashion (RCOA Memorandum, p. 2, Degling Affidavit filed February 19, 1975, ¶15). RCOA prefaces its answers in the Kinney case by stating: "Plaintiff is unable at this time to supplement fully the indicated interrogatories

within the time frame of December 30, 1974, extended to January 7, 1975, by further order of the Court."

The Court finds that defendants' interrogatories are relevant, if not central, to RCOA's claims of liability and damages; that to the extent RCOA has answered at all, the answers provided by RCOA are inadequate and unresponsive; that there exists no valid excuse, in a case pending almost seven years, for RCOA's continued failure, over a period of almost four years, to answer fully and completely, that RCOA has willfully disobeyed the orders of the Court requiring answers; and that dismissal of this seven-year-old litigation is not only justified, but compelled under the circumstances.

Discussion

We recognize the cardinal principle that dismissal, being the severest of sanctions, is to be most sparingly used. The sanction of dismissal, though its imposition is committed to our discretion, is one which should not be invoked "precipitately or rashly". *DiGregorio* v. *First Rediscount Corp.*, 506 F. 2d 781, 788 (3d Cir. 1974). In *DiGregorio* the Court of Appeals stated:

> "Because dismissal is the most severe sanction available to a district court under Rule 37, we are ever reluctant to affirm its invocation." [*Id.* at 788]

In the light of the history of this case, we have certainly not acted "precipitately or rashly".

We are acutely aware that the sanction of dismissal is permanent and fatal to RCOA's claim and that it must always be "tempered by the careful exercise of judicial discretion to assure that its imposition is merited." *Trans World Airlines* v. *Hughes*, 322 F. 2d 602, 614 (2d Cir.

1964). Mindful of these cautions, the Court has, in the exercise of discretion, repeatedly and patiently denied the various motions to dismiss previously filed in these actions, time after time giving RCOA additional opportunity to comply with the outstanding discovery orders.

On the other hand, it is noted that dismissals pursuant to Rule 37 have been upheld in circumstances far less egregious than those involved here. *Norman* v. *Young*, 422 F. 2d 470 (10th Cir. 1970); *Diapulse Corp. of America* v. *Curtis Publishing Co.*, 374 F. 2d 442 (2d Cir. 1967); *Von Der Heydt* v. *Kennedy*, 299 F. 2d 459 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 916 (1962); *Brookdale Mill* v. *Rowley*, 218 F. 2d 728 (6th Cir. 1954); *United States ex rel. Weston & Brooker Co.* v. *Continental Casualty Co.*, 303 F. 2d 91 (4th Cir. 1962).

It is well recognized, and the reason therefor is amply demonstrated in these cases, that dismissal for failure to provide adequate discovery "is particularly appropriate in complex antitrust litigation like that now before the Court where efficient and effective discovery procedures are essential to orderly adjudication." *Philadelphia Housing Authority* v. *American Radio & Standard Sanitary Corp.*, 50 F.R.D. 13, 19 (E.D. Pa. 1970); *aff'd sub nom. Mangano* v. *American Radio & Standard Sanitary Corp.*, 438 F. 2d 1187 (3d Cir. 1971); *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602, 615 (2d Cir. 1964); *In re Professional Hockey Antitrust Litigation*, 63 F.R.D. 641 (E.D. Pa. 1974), appeal pending.

As Judge Higginbotham said in *In re Professional Hockey Antitrust Litigation, supra*, at 656:

> "If the discovery process is abused or allowed to be frustrated by the parties, then the entire pretrial procedures and the discovery provisions of the Federal Rules of Civil Procedure can be turned into a mockery. • • • Sanctions become meaningless unless they are applied when the circumstances demand them, though harsh they may be."

In the *Professional Hockey* case, it appears that plaintiffs had also failed to answer interrogatories relating to the nature and amount of their alleged damages, although, in contrast, there only seventeen months had passed after the filing of the interrogatories. Here, RCOA has had nearly four years to file adequate answers, and to comply with the repeated and outstanding orders of this Court. RCOA has repeatedly benefited by the Court's patience, but in so doing has frustrated the orderly progress of the judicial process and has finally brought upon itself the extreme consequence of dismissal.

The burdens imposed upon the defendants' resources during the intervening years, the repeated hearings before the Court, the continued arguments over substantially the same or similar issues in discovery, the repeated assurances of future compliance, followed by continued failure or refusal to comply, the continued use or misuse of judicial time and resources and the undesirable congestion of court calendars and dockets compel the conclusion here reached.

RCOA contends initially (pp. 5-11 of RCOA's Memorandum in Opposition to Motion to Dismiss) that its answers are sufficient to show that RCOA will be able to sustain its burden of proof at trial with respect to its measure of damages, and that, therefore, the answers provided are not deficient. RCOA, however, has failed to meet defendants' assertion that, in order to sustain its burden

of proving that the exclusive licenses *caused* injury, RCOA must show that its cost of acquiring finished records was higher than would have been the case had RCOA been able to obtain records pursuant to licenses. This burden necessarily involves a comparison between RCOA's true cost of obtaining records and CBS's cost for obtaining the same records. Notwithstanding years of litigation and days of argument and/or hearing, we have been unable to reach the point of comparison.

It is, moreover, undisputed by RCOA that the information sought is relevant and is necessary for *defendants* to prepare for trial. *Cf. Nagler* v. *Admiral Corporation,* 167 F. Supp. 413, 416 (S.D.N.Y. 1958); *Kainz* v. *Anheuser-Busch,* 15 F.R.D. 242, 249 (N.D. Ill. 1954). Although RCOA argues that it suffices to introduce at trial evidence only of RCOA's aggregate costs of obtaining unspecified records, defendants certainly have a basic interest in developing and presenting and the right to develop and present to a jury accurate facts surrounding the question whether the phonograph records obtained by RCOA were the same records CBS allegedly obtained at a lower price by license. RCOA's answers are wholly insufficient to provide that crucial information following literally years of discovery litigation.

RCOA next contends that dismissal of the action for failure to answer interrogatories or provide discovery, although so ordered three times over a forty-two-month period, is inappropriate when the failure results from inability, rather than willfulness or bad faith. Although no case is cited which holds that financial inability is an excuse for non-compliance, RCOA relies on *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958). In that case, the leading Supreme Court opinion construing Rule 37, the

plaintiff, had it complied with the order of the district court requiring production of documents, would have subjected itself to criminal sanctions in Switzerland, where it was incorporated. The Court stated (357 U.S. at 212):

> "• • • we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a production order when it has been established that failure to comply has been due to inability, *and not to willfulness, bad faith, or any fault of petitioner.*" (Emphasis added)

RCOA's non-compliance does not come within the limiting language of the Supreme Court in *Societe Internationale.* Its "fault" is clearly evident on this record.

Were this the first time RCOA's failure had come before the Court, RCOA's financial condition might conceivably have a bearing upon the scope of any order requiring answers. It would not serve, however, to excuse a plaintiff from providing any information at all. However, on this record of repeated disobedience to the Court's orders and prolonged delay in providing any responsive information during a long period involving no financial distress, RCOA's present and most recent financial condition cannot excuse its continuing non-compliance. It is abundantly clear to the Court that RCOA is solely responsible for the position in which it now finds itself.[11] At no time before the entry

[11] RCOA claims that it must be afforded a hearing with respect to its purported inability to answer the interrogatories to accord with due process of law (RCOA Memorandum n. 5). The Court has on at least three occasions given RCOA a full hearing regarding its failure to answer these interrogatories, including a day of testimony on August 27, 1974. "Due process" has already led us down this long trail of briefs, reply briefs, supplemental briefs, affidavits, reply affidavits, oral argument hearings, testimony and

of the Court's orders of October 22, 1971, November 17, 1972, and November 1, 1974, did RCOA suggest that it was unable for any reason to answer the interrogatories. On the contrary, RCOA's consistent position has been that the information could be and would be obtained from its books and records, and that it was simply a matter of undertaking the task of compiling the data, a burden RCOA had initially attempted to place on defendants.

Under these circumstances, the conclusion that RCOA's financial inability does not excuse non-compliance is compelled by the Supreme Court's construction of *Societe Internationale* in *Link* v. *Wabash R. R.*, 380 U.S. 626 (1962). In *Link*, the district court dismissed, without notice or hearing, a personal injury action because petitioner's attorney failed to appear for a scheduled pre-trial conference, his only failure to comply with a court order. The Supreme Court sustained the dismissal pointing out that "there is nothing in the record before us to indicate that counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect." The Supreme Court held that (370 U.S. at 636):

> "* * * this is not a case in which failure to comply with a court order 'was due to inability fostered neither by * * * [petitioner's] own conduct nor by circumstances within its control.' *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211."

This case falls squarely within the holding of the Court of Appeals in *DiGregorio* v. *First Rediscount Corp.*, 506

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counter-testimony. Indeed, considering the burdens, financial and otherwise, which that long journey has placed upon the defendants, "due process" and the cause of justice dictate that *that* trail shall end here.

F. 2d 781 (3d Cir. 1974). There, the Court of Appeals affirmed dismissal of a wrongful death action because of plaintiff's failure to answer interrogatories, even though the district court had made no specific finding of willfulness and despite the fact that plaintiff claimed she was unable to answer the interrogatories. The Court of Appeals perceived "a pattern of conduct in flagrant disregard both of the general rules of discovery and of a specific court order" and found that willfulness was "mirrored in the record". 506 F. 2d at 788. A similar pattern of conduct by RCOA is evident on this record.

The Court finds that RCOA's present inability, if such it be, to answer defendants' interrogatories is due solely to RCOA's past willful disregard for the orders of this Court. RCOA's present state of insolvency cannot excuse non-compliance with the order originally entered October 22, 1971, reiterated thirteen months later on November 17, 1972, and once more directed two years later on November 1, 1974. To hold otherwise would countenance a contumacious course of conduct which has already delayed the resolution of this litigation beyond all reasonable bounds and would further, irretrievably prejudice defendants in their defense of the action. RCOA's legal position is not the result of its present or recent financial condition. It is the result of its continued refusal or neglect to meet the burden of discovery properly resting upon it in litigation voluntarily instituted by it. RCOA has never been obligated to involuntarily assume the burdens placed upon the defendants in this protracted and complex litigation. It has long sought to frustrate the defendants in discovery properly sought by them. The cause of these long-suffering defendants cries out for the relief afforded by the Rules of Civil Procedure.

Memorandum and Order

Accordingly, the Court is thus compelled to grant defendants' motions and to dismiss the actions with prejudice pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure. The foregoing shall constitute the findings of fact and conclusions of law required by F.R.Civ.P. 52(a).

Appendix B

Opinion of the Court

(Filed July 2, 1976)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1812, 75-2001 & 75-2002

IN RE:

CBS LICENSING ANTITRUST LITIGATION

Record Club of America, Inc.,

Appellant.

(D. C. MDL No. 59)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 8, 1976

Before KALODNER, VAN DUSEN and WEIS,
Circuit Judges

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VAN DUSEN, *Circuit Judge.*

The appeals at Nos. 75-2001 (the "CBS" case) and 75-2002 (the "A & M" case) challenge a May 20, 1975, district court order[1] dismissing, with prejudice, two coordi-

[1] The May 20, 1975, dismissal order is reproduced at 2577a. The MEMORANDUM in support of the order appears at 2559a-2576a.

nated civil actions[2] claiming damages for violations of antitrust and trade regulation laws, for failure to comply with orders to answer interrogatories. The appeal at No. 75-1812 (the "Kinney" case) challenges the same May 20, 1975, district court order, which also dismissed another coordinated civil antitrust and trade regulation action for the same reason.[3]

The May 20, 1975, order granted motions to dismiss pursuant to F. R. Civ. P. 37(b)(2)(C) and 41(b).[4] We affirm that order.

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[2] Civil No. 68,1132, E. D. Pa. (Record Club of America, Inc. v. Columbia Broadcasting System, Inc., et al.), subject to the appeal at No. 75-2001, and Civil No. 71-220, E. D. Pa., being Civil No. 70-2320, S. D. N. Y. (Record Club of America, Inc. v. A & M Records, et al.), subject to the appeal at No. 75-2002. Civil No. 70-2320, S. D. N. Y., was transferred to the Eastern District of Pennsylvania in 1971 for coordinated pretrial proceedings with Civil No. 68-1132 by the Judicial Panel on Multi-District Litigation (D. C. MDL No. 59). See 28 U. S. C. § 1407.

[3] This action was commenced in S. D. N. Y. as 71 Civil 5096 and transferred to E. D. Pa. in April 1972, where it was docketed as Civil No. 72-819 (Record Club of America, Inc. v. Kinney Services, Inc., et al.).

[4] F. R. Civ. P. 37(b)(2)(C) provides, *inter alia:*

"(b) Failure to comply with order.

* * *

"(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . . ."

I. *The CBS Case (No. 75-2001)*

In the CBS case the district court had denied similar motions, without prejudice to their renewal, on two previous occasions.

In May 1968, the Record Club of America, Inc. (RCOA) filed a complaint against the Columbia Broadcasting System, Inc. (CBS) and a number of companies engaged in the manufacture and distribution of phonograph records and tapes,[5] alleging five counts of antitrust and trade regulation violations beginning in 1961. A sixth count was later added.[6] According to the complaint, the alleged violations

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F. R. Civ. P. 41(b) provides:

"(b) Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

[5] Columbia Records Distributing Corp.; Herb Alpert, as partner in A & M Records; Jerome Moss, as partner in A & M Records; A & M Records; A & M General Corp.; Irving Music, Inc.; Consolidated Electronics Industries Corp.; Mercury Record Productions, Inc.; Mercury Record Manufacturing Co., Inc.; Mercury Record Corp.; Motown Record Corp.; Vanguard Recording Society, Inc.; Vanguard Record Sales Corp.; Vanguard Stereolab, Inc.; Warner Bros. Pictures Corp.; Warner Bros. Records, Inc.; Warner Bros. Records Sales Corp. Only CBS and the Warner defendants remain in this appeal.

[6] The original and amended complaint alleged the following violations:

Count I—Restraint of Trade, Sections 1 and 3 of the Sherman Act, 15 U. S. C. §§ 1 and 3; Count II—Attempt to Monopolize, Monopolization, and Conspiracy to Monopolize, Section 2 of the Sherman Act, 15 U. S. C. § 2; Count III—Asset Acquisitions, Section 7 of the Clayton Act, 15 U. S. C. § 18; Counts IV and VI—Discrimination, Sections 2(a) and 2(f) of the Robinson-Patman Act, 15

arose from certain exclusive licenses granted CBS by the manufacturers for purposes of marketing records and tapes through its mail order operations. As a result, RCOA claimed it was forced to purchase similar records and tapes from distributors, manufacturers and others at *costs* higher than those incurred under CBS licenses.

All defendants moved to dismiss Count V of the complaint, on grounds that violations of Section 5 of the Federal Trade Commission Act do not give rise to a private right of action. All defendants except CBS moved to dismiss Count III of the complaint on grounds that, where assets are acquired in violation of Section 7 of the Clayton Act, there is no cause of action against the party whose assets are acquired. Both motions to dismiss were granted on November 27, 1968. In 1970, the district court dismissed Count IV of the complaint. See *Record Club of America, Inc.* v. *Columbia Broadcasting System*, 310 F. Supp. 1241 (E. D. Pa. 1970).

U. S. C. § 13(a); Count V—Unfair Competition, Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45.

The background of CBS's activities as the first major phonograph record club in this country and of its short-term licensing agreements are set forth in *Columbia Broadcasting System, Inc., et al.*, 72 F. T. C. 27, 65, 76-90, 94 (1967), *reversed*, 72 F. T. C. 322 (1967), *reversed, Columbia Broadcasting System, Inc.* v. *F. T. C.*, 414 F. 2d 974 (7th Cir. 1969), *cert. denied*, 397 U. S. 907 (1970). As a result of a consent decree approved on March 22, 1971, which did not contain any admission by CBS of a violation of law by its terms and provided that exclusive licenses would not be used, the FTC litigation was concluded. RCOA apparently instituted this action in 1968 in reliance on the FTC suit and its 1967 ruling, which was subsequently vacated by the U. S. Court of Appeals for the Seventh Circuit, as noted above. See pages 7 and 8 of plaintiff's brief at Nos. 75-2001 and 75-2002, and defendants' brief in those appeals at pages 5-7.

On May 19, 1971, CBS filed and served its initial interrogatories on RCOA.[7] The interrogatories sought, *inter alia*, detailed information regarding RCOA's costs of obtaining records and tapes, including title and manufacturer's catalog number of each record sold by RCOA (interrogatories Nos. 1, 2, 23 and 25),[8] information regarding the cost to RCOA of acquiring records and tapes under the licensing agreements it had (interrogatories Nos. 3 and 4), the alleged conspiracy (interrogatories Nos. 13, 14 and 15) and the issue of damages (interrogatories Nos. 16 and 17).

On June 23, 1971, more than the 30 days permitted by F. R. Civ. P. 33(a),[9] RCOA interposed specific and general objections. The general objections were grounded on the contentions that (1) the interrogatories were burdensome in that they called for information which would be incomplete until CBS complied with RCOA's discovery requests, and therefore any answers given would necessarily require updating, and (2) as provided under F. R. Civ. P. 33(c),[10] answers to the interrogatories might be derived from documents already made available to CBS (538a).

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[7] The interrogatories are found at pp. 521-537 of the appendix. Until this time, the parties had commenced discovery by the production of documents, the taking of depositions, and the posing of certain interrogatories by RCOA.

[8] RCOA claimed that CBS's exclusive licenses forced RCOA to pay at least 72¢ more per record than it would have to pay in the absence of such licenses.

[9] Rule 33(a) provides in pertinent part:

"The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories."

[10] Rule 33(c) provides:

"Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination,

On September 3, 1971, CBS moved to compel answers to all of its interrogatories and filed supporting affidavits of two independent accountants retained by CBS, who had examined RCOA's documents and alleged that they did not contain information from which complete answers to CBS's "cost" interrogatories could be compiled (551-568a).

The motion was orally argued on October 22, 1971. In opposition, RCOA reiterated its objections, argued that under Rule 33(c) it was permitted to offer documents in lieu of answers, and asserted that, contrary to the affidavits of CBS accountants, the cost information was ascertainable from the documents already produced.

After oral argument, the court, on October 22, 1971, entered an order granting CBS's motion to compel and directing RCOA to answer the interrogatories (611a).

Some seven months later, on May 19, 1972, RCOA filed answers to the CBS interrogatories. The interrogatories seeking RCOA's costs of acquiring records and tapes were answered by directing CBS to certain documents which RCOA would afford CBS an opportunity to examine (699a). As to the damage and conspiracy interrogatories, RCOA refused to answer until completion of discovery (712a), a ground RCOA had raised formerly by its objections (538a & 540a).

Alleging that RCOA's answers were "totally" nonresponsive, and in "willful violation of the court's order of

audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

October 22, 1971," CBS moved on September 8, 1972, to compel further answers to its interrogatories (745a-784a). RCOA responded by invoking, once again, the "Option to Produce Business Records" granted by F. R. Civ. P. 33(c) (816-52a).

On November 13, 1972, CBS further moved the court to dismiss the action, pursuant to Rules 37 and 41, F. R. Civ. P. (see note 4 above), on the ground that RCOA had failed to file full and complete answers to its interrogatories (881a). Oral argument was heard on these and other motions on November 16 and 17, 1972, at which time RCOA repeated its Rule 33(c) argument. At oral argument, counsel for RCOA responded affirmative to the court's inquiry of whether the CBS interrogatories could be answered, but had "no idea" how long it would take (921-22a).

On November 17, 1972, the district court orally granted CBS's motion to compel RCOA to submit further answers to the interrogatories at its cost and expense. As to all answers completed without reference to Rule 33(c), the court directed that RCOA had a "continuing obligation to further answer such interrogatories as information becomes available." In addition, RCOA was ordered to submit to the court, commencing January 1, 1973, monthly reports summarizing the progress of discovery. The court denied the CBS motion to dismiss the complaint "without prejudice to its renewal in the event of noncompliance with the order heretofore entered" (929-30a).

The court also granted RCOA's motion to lift an order it had previously entered staying all discovery,[11] "subject

[11] The motion to stay discovery had been ordered by the court on May 25, 1972, in an effort to determine whether negotiations could produce settlement between the parties (738a).

to compliance by the plaintiff with the discovery previously ordered" (930a).

Counsel for RCOA commenced submission of its monthly status reports on December 21, 1972 (933a). In its February 1, 1973, report, counsel for RCOA indicated that it would respond to defendants' interrogatories "on or before March 1, 1973" (946a). The March 5, 1973, report projected the response date to be March 16, 1973 (1122a). By May 1, 1973, RCOA "could not in good faith now submit a date by which we expect those answers to be completed. . . ." (1197a). On June 1, 1973, RCOA predicted a completion date of "about August 15-September 15, 1973" (1219a). In the report of September 5, 1973, RCOA expected to submit supplemental answers to certain CBS interrogatories within a week and completion of the CBS cost interrogatories by November 15, 1973 (1448a). On November 7, 1973, RCOA indicated that final and complete answers to the cost interrogatories could not be provided until March 10, 1974 (1512a). The March 7, 1974, report gave notice that answers were "nearing completion" (1582a).

On March 27, 1974, responses to the interrogatories had still not been submitted, and CBS renewed its motion to dismiss the complaint on the grounds of RCOA's persistent failure to supply answers and to comply with the orders of the district court (1596a).

On April 2, 1974, "Plaintiff's Supplemental Answers to CBS' Initial Inerrogatories" were served (1675a). For the most part the answers directed CBS to documents submitted with previous answers or suggested that the information requested be culled from CBS's own files. On April 8, 1974, RCOA served answers to interrogatories Nos. 1, 2 and 23, consisting of volumes of computer print-outs (1635a).

In light of RCOA's actions, on June 25, 1974, CBS filed a motion to compel further answers on the basis that the answers to the interrogatories were "wholly unsatisfactory," or, in the alternative, for an order dismissing the action or precluding the introduction of evidence (1713a).

CBS's motion was granted on November 1, 1974, and RCOA was specifically ordered to provide further answers to interrogatories Nos. 1 and 2, so as to include certain prefix identification numbers,[12] and, as well, to provide further answers to other challenged interrogatories. The order was grounded on the court's finding, after three days of oral testimony, that the computer print-outs did not provide adequate identification of the phonograph records acquired by RCOA, thus making it impossible to determine RCOA's costs (2567a, n. 9). The order also, for the second time, denied CBS's motion to dismiss without prejudice to its renewal in the event that supplemental answers were not filed within thirty days (2386-87a).

On December 10, 1974, which was beyond the 30-day limit, RCOA filed "Plaintiff's Further Answers to Certain CBS Interrogatories" (2394-2413a). Therein RCOA referred to 10 volumes of computer print-outs which had been lodged with the Clerk of the district court four days earlier. RCOA had not served copies of the print-outs on CBS and subsequently the court ordered RCOA to do so (2422a).

On December 24, 1974, RCOA moved for a stay of the instant proceedings on the ground that "on December 23,

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[12] In the record industry, prefix information is included in a record's catalog number for purposes of distinguishing between monaural and stereophonic records, which during most of the relevant period from 1961 to 1969 had different costs and prices.

1974, plaintiff filed a petition for an arrangement under Chapter 11 of the Bankruptcy Act . . . ." Said motion was denied by the court on January 28, 1975 (2418a, 2499a).

In the meanwhile, on January 24, 1975, for the fourth time, CBS moved the court to dismiss the complaint on the ground that RCOA had failed to comply with discovery requests and with orders of the district court dated October 22, 1971, November 17, 1972, and November 1, 1974. In support, CBS alleged that much of the prefix information that RCOA had been ordered to provide was either omitted or erroneously included in the print-out volumes, and that other interrogatories had still not been answered satisfactorily (2441-81a).

The court on May 20, 1975, issued its Memorandum and Order dismissing the actions with prejudice under Rule 37(b)(2)(c) (2602a). RCOA's subsequent motion to alter, amend or vacate judgment was denied on June 25, 1975 (2579a, 2599a). Notice of appeal in this action was filed on July 24, 1975 (2602a).

RCOA contends on this appeal that the district court erred in (1) dismissing the complaints under F. R. Civ. P. 37(b)(2)(c); (2) in abusing its permissible discretion under F. R. Civ. P. 26(b) by the restrictions it imposed on the scope of RCOA's discovery;[13] (3) in dismissing the Clayton Act § 7 counts of the complaints; and (4) in holding that no private right of action exists for injuries stem-

[13] Prior to service of CBS's initial interrogatories, RCOA sought discovery, *inter alia*, with respect to all CBS transactions in recorded tapes prior to August 1969, information regarding CBS non-exclusive licenses, and all documents related to the wholesale, retail price or mail order price charged by CBS or any other record clubs for records and tapes. The district court, in ruling on objections interposed by CBS, denied discovery into these areas (609-10a; 78-79a, Nos. 24-27; 238a, Nos. 24-27).

ming from violations of § 5 of the Federal Trade Commission Act (brief for appellant, p. 2).

We do not reach appellant's latter three contentions since we are of the opinion that the district court was justified in dismissing the complaint.

RCOA's claim that the district court erred in dismissing the complaints under Rule 37(b) is grounded on the following contentions, which are considered below under A-E, respectively: (1) the orders directing RCOA to answer the disputed interrogatories were unlawful; (2) RCOA has, in any event, complied with the court's orders; (3) the trial court made no demonstration why sanctions less onerous than dismissal would have been ineffective to cure whatever defaults it may have perceived; (4) RCOA made a good faith effort to answer, and any claimed default was not willful or caused by matters within its control; and (5) the district court, in disregard of RCOA's right to due process, failed to hold an evidentiary hearing to determine whether RCOA willfully disobeyed the orders of the court (brief for appellant, p. 32).

A. *The district court's orders directing RCOA to answer the cost, conspiracy and damage interrogatories, for example, 1, 2 & 13-17, were justified by the record.*

Although the interrogatories were filed on May 19, 1971, no objections were timely filed and it was not until June 23 that objections, several conclusory in nature, were filed (537-50a). No answers were filed until May 19, 1972. The October 22, 1971, order to answer the original interrogatories was clearly justified by the record. Similarly, the orders compelling further answers of November 18, 1972 (not complied with in any form until RCOA served 9000 pages of print-outs and answers on April 8, 1974) and November 1, 1974, the order to add prefixes and serve further

answers within 30 days, and the December 30, 1974, order to serve answers on CBS were supported by the record. See pages 2-11 of the district court's May 20, 1975, Memorandum (2561-69a). In the above-mentioned Memorandum, the district court pointed out, *inter alia:*

> ". . . RCOA sought to shift the burden, stating that it was possible to compile the necessary information from the documents produced. It made no effort to compile the information and thus expedite the litigation. Its efforts were devoted to delaying rather than expediting discovery.
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> "After oral argument, the Court, on October 22, 1971, entered an order granting CBS's motion to compel and directing RCOA to answer all interrogatories. [2563a]
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> • • •
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> ". . . RCOA was attempting to resurrect its original objection to answering the cost interrogatories, a matter the Court had resolved, it thought, on October 22, 1971. RCOA furnished no answers to the conspiracy interrogatories, and no answers to the so-called 'damage interrogatories' (Interrogatories 16 and 17), stating that answers would be provided after discovery.
>
> "Thereafter on September 8, 1972, CBS again moved to compel answers to most of its interrogatories, but also requested the Court to dismiss the action under Rules 37 and 41 F. R. Civ. P. because of RCOA's failure to answer the interrogatories. This motion was joined in by defendants in the A & M and Kinney cases as well.
>
> "At this point in the proceedings, almost four and one-half years after the institution of the CBS action

> and one year after the Court had directed RCOA to supply answers, the Court would have been fully justified, we think, in dismissing the action. RCOA had simply ignored the order of October 22, 1971, and offered no excuse for its noncompliance. Without answers to CBS's cost, damage or conspiracy interrogatories, defendants were unable to conduct meaningful discovery by oral depositions or otherwise and were obviously prejudiced in their preparation for trial. Moreover, RCOA's unwillingness to answer created grave doubts as to whether RCOA could support at trial the contention, central to its case on both liability and damages, that because of the exclusive licenses held by CBS, RCOA was forced to obtain finished records and tapes at a cost higher than CBS's costs for records and tapes, thus allegedly putting RCOA to a competitive disadvantage in the record club business. [2564-65a].
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> • • •
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> "For the next year and a half, nothing was done by RCOA to advance its cause." [2565a]

The district court was justified on this record in concluding that the print-outs and documents supplied by plaintiff did not constitute an answer to the above-mentioned interrogatories under F. R. Civ. P. 33(c)—see note 10 above. CBS had requested the manufacturer's catalog number of records distributed by RCOA during the relevant period (1961-1969), as well as cost information concerning "discounts, allowances and rebates."

The trial judge's finding that the prefix was a part of the manufacturer's catalog number and that such number was necessary in order to determine RCOA's costs was sup-

ported, *inter alia,* by the testimony taken on August 27, 1974.[14] Under these circumstances, there was no abuse of discretion in refusing the plaintiff permission to answer the cost interrogatories by volumes of print-outs, many of which only contained the numerical number of the record without the letter prefix which identified the record as monaural or stereo in many cases. Since only RCOA knew the percentage discount that was granted by the manufacturer, "the burden of deriving or ascertaining the answer" was not substantially the same for the party serving the interrogatory as for the party served" if the print-outs were to be the sole business records supplied to defendants. See F. R. Civ. P. 33(c).[15]

A Rule 33(c) option to produce business records is available "subject, of course, to the judge's approval." *Burns*

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[14] Even the President of RCOA explained that a person would have to know the percentage discount from the manufacturer's list price to determine whether certain numerical numbers identified monaural or stereo records, and the computer print-outs RCOA contended would show its costs did not show in many cases the prefix or the monaural or stereo designation of the record (2312-13a). Also, on cross-examination, this witness conceded that "you have to have either price information or some other identification" (2333a). In our view, the record in *Daiflon, Inc.* v. *Allied Chemical Corp.*, —— F. 2d —— (10th Cir., Opinion of 4/16/76, 1976—1 Trade Cases 60,829), is quite different from that in this case.

[15] The Advisory Committee's Note to subdivision (c) of F. R. Civ. P. 33, made at the time that subdivision was added to the Rule, includes this language:

> "The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records."

See 48 F. R. D. 487, 524-25.

v. *Thiokol Chemical Corporation,* 483 F. 2d 300, 307 n. 10 (5th Cir. 1973). Here the trial judge heard oral argument on Rule 33(c) and reviewed legal memoranda on the subject. The court, apparently unpersuaded, chose to believe the statements, made under oath, by the two accountants retained by CBS, who, after examining RCOA's books and records, were unconvinced that the information called for in the interrogatories could be compiled from the documents and print-outs.

RCOA also complains that the district court's November 1, 1974, order requiring RCOA to provide prefix information was unlawful, since the information was "wholly irrelevant to the subject matter of the trial." In support, RCOA directs our attention to its offer to stipulate at trial, which CBS rejected, that any ambiguity regarding monaural or stereophonic identification resulting from lack of prefix information could be resolved, within certain cost limitations, adversely to RCOA.[16] We are not convinced that the prefix information was "wholly irrelevant." As mentioned earlier, the district court ordered RCOA to furnish CBS with prefix information after oral testimony, including that of RCOA's president, which led the court to conclude that

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[16] RCOA stated it was prepared to stipulate

> "'that where particular records are prefix sensitive as defined hereafter, and prefix information is not available in RCOA's answers'—and we footnote: or in the computer run that we are prepared to make—'CBS may assume that such records are either monaural or stereophonic, whichever CBS prefers, and RCOA will not contest that assumption.'
>
> "'We recognize that a cost difference of apparently 6.4 cents to 12½ cents for each such record may thus be allocated against RCOA's interest in a way that would reduce the potential damages, but we make the offer to avoid further controversy and to demonstrate that the issue is de minimus when measured against the great quantum of damages in this lawsuit.'" (2370-71a)

prefix information was necessary to determine RCOA's costs. Nor are we persuaded that the court's order was unwarranted by reason of RCOA's proffered stipulation. The stipulation, by its terms, did not adequately provide CBS with the information necessary to meet RCOA's damage allegations or protect it from the consequences of the lack of such information in view of the 12½¢ limitation.

We also recognize no error in the district court's finding that "the answers provided by RCOA are inadequate and unresponsive," and "that there exists no valid excuse for RCOA's failure to supply full and complete answers," and therefore RCOA's claim that it has complied with the district court's discovery orders must fall. A brief summary of the disputed interrogatories and the final answers furnished by RCOA demonstrates the propriety of the district court's finding.[17]

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[17] Interrogatories Nos. 1(iv), 1(xiv), 1(xxi) and 1(xxii) asked for a listing by title and manufacturer's catalog number of all records "manufactured, produced, distributed and/or sold" by four record companies (524a). RCOA answered that it "lacked sufficient knowledge or information" to answer (2396a).

Interrogatory No. 2(viii) sought data regarding allowances, discounts and similar payments "on an annual basis" with respect to each record listed in response to interrogatory No. 1 (525a). RCOA's answer referred to computer print-out material previously submitted (2397a).

Interrogatory No. 2(ix) sought RCOA's "[s]elling price or prices" to record club members with respect to each record listed in response to interrogatory No. 1 (525a). RCOA answered that "[i]t is not possible to determine from plaintiff's business records the price or prices at which a particular record unit purchased by plaintiff was sold during the interrogatory period" (2400a).

Interrogatories Nos. 2(vi), 4(viii), 4(ix) and 4(xvi) requested quantities of records distributed to members as free or bonus records, names and catalog numbers of records distributed under license, "master" records obtained by RCOA under licenses, and "on an annual basis" quantities of record distributed through the club under license (525a-528a). As it had in its previously served answers (1675a), RCOA responded that the information was contained in royalty statements that had already been produced to CBS (2400-02a, 2406a).

Interrogatory No. 4(xii) sought cost information with respect to the manufacture by RCOA of records under license. RCOA responded by making reference to documents previously given to CBS (2403-04a).

Interrogatory No. 4(xiv) sought the selling price of each record under a license agreement (528a). RCOA responded that the information "is not possible to determine from plaintiff's business records" (2405a).

Interrogatory No. 4(xxiv) sought the "value to plaintiff of each licensing agreement" (528a). RCOA responded that it did not assign an accounting value to a license agreement and went on to describe the general benefits of a license agreement (707a).

Interrogatory No. 24 sought price and quantity information, "on an annual basis," regarding RCOA's "10 best selling long playing records" (533a). RCOA responded that its books and records "do not contain the information required to answer the interrogatory" (2411a).

Additionally, many of the responses contained this language:

> "At this time, plaintiff lacks sufficient financial resources to undertake the essentially mechanical, but massive, task, which defendant CBS is as capable of performing as the plaintiff, of transcribing the information from these records in the form demanded in this interrogatory, and plaintiff therefore cannot answer the interrogatory at present" (2574a).

RCOA's reliance on CBS to retrieve information contained in business records and documents supplied to CBS had been rejected by the court through its earlier discovery orders, which are supported by the record.

Moreover, as the district court aptly noted, "RCOA's consistent position has been that the information could be and would be obtained from its books and records, and that it was simply a matter of undertaking the task of compiling the data" (2574a). Accordingly, even if RCOA's final answers were the best it could give, RCOA's repeated assurance that answers were forthcoming undermine any characterization of adequacy or responsiveness which might be attributable to the answers finally submitted. Additionally, lack of financial resources in light of the ap-

parently financially healthy four-year period preceding RCOA's filing for bankruptcy, cannot stand as an excuse to the submission of appropriate responses ordered by the district court.

B. *The district court's conclusion that RCOA had not complied with its discovery orders was not reversible error.*

Our examination of the record persuades us that it supports the following statements in the district court opinion at 2568-69a:

> "Defendants claim that RCOA has failed to supply full and complete answers to CBS's Interrogatories 1(iv), 1(xiv), 1(xxi), 1(xxii), 2(viii), 2(ix), 2(x), 2(xi), 4(viii), 4(ix), 4(xii), 4(xiv), 4(xvi), 4(xxiv) and 24. In addition, CBS asserts that the answers provided by RCOA to Interrogatories 1 and a(i)-2(xi) are inaccurate and deficient. As noted, a copy of the answers to Interrogatories 1 and 2(i)-2(xi) were not served upon CBS and CBS's position is based upon an examination of the computer print-out filed with the Clerk (Thurlby Affidavit filed on January 24, 1975).
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> "In the A & M case, no answers were filed by RCOA as required by the order of November 1, 1974, and in the Kinney case, defendants contend the answers are inadequate on their face.
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> "RCOA has, in opposition to CBS's motion to dismiss, admitted its failure to provide further answers to Interrogatories 2(viii), 2(x), 4(viii), 4(ix), and 4(xxi), as required by the Court's order, but now states that it 'lacks sufficient present resources to answer the remaining interrogatories in whole or in part' (RCOA Memorandum, p. 2, n. 2, Degling Affidavit filed February 19, 1975, ¶¶2-14). In the A & M case, RCOA states that it lacks sufficient financial resources to answer defendants' interrogatories in any fashion (RCOA Memorandum, p. 2, Degling Affidavit filed February 19, 1975, ¶15). RCOA prefaces its answers in the Kinney case by stating: 'Plaintiff is unable at this time to supplement fully the indicated interrogatories within the time frame of December 30, 1974, extended to January 7, 1975, by further order of the Court.'
>
> "The Court finds that defendants' interrogatories are relevant, if not central, to RCOA's claims of liability and damages; that to the extent RCOA has answered at all, the answers provided by RCOA are inadequate and unresponsive; that there exists no valid excuse, in a case pending almost seven years, for RCOA's continued failure, over a period of almost four years, to answer fully and completely, ..."

C. *The court tried less onerous sanctions than dismissal and they proved ineffective to cure the continued refusal of RCOA to answer pending interrogatories.*

In several respects and on several occasions, the district court imposed lesser sanctions than dismissal on RCOA in order to induce it to comply with discovery orders:

1. On November 17, 1972, the district court granted several motions by RCOA for discovery but they were stayed pending the giving by RCOA of discovery concerning which it was delinquent.[18]

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[18] ". . . stayed pending One, compliance by the Plaintiff with the order of the Court regarding the answers to interrogatories heretofore entered; and, Two, the completion of the deposition of Mark Lewis" (930a).

2. In the same order, discovery sought by RCOA (production of documents by CBS) was "denied without prejudice to its renewal upon completion of the discovery previously ordered" (930a).

3. A motion to lift a stay of discovery previously imposed on RCOA was denied in the CBS case "pending compliance by the Plaintiff with the discovery previously ordered" in the same November 1972 order (930a).

4. Counsel for RCOA was directed in the same order "to submit monthly to the court hereafter, commencing on January 1, 1973, and continuing, a brief statement of the discovery undertaken, the progress made and that completed, if any, during the preceding month" (932a).

At the time the above sanctions less than dismissal were imposed, the court denied the first motion of CBS to dismiss the complaint pursuant to F. R. Civ. P. 37 and 41 "without prejudice to its renewal in the event of noncompliance with the order heretofore entered" (929a-930a).

When the second motion of CBS to dismiss was denied on November 1, 1974, it was denied "without prejudice to its renewal in the event that supplemental answers were not filed within thirty days" (2387a). In the same order, the stay of RCOA's discovery was continued "in effect pending compliance with this order until otherwise ordered by this court."

Under these circumstances, the district court's action was in compliance with the language used by this court in the recent decision of *In re Professional Hockey Antitrust Litigation*, —— F.2d —— (Nos. 74-2113/2118, 3d Cir., 2/23/76), *reversed sub nom. National Hockey League* v. *Metropolitan Hockey Club, Inc.*, —— U.S. —— (6/30/76,

No. 75-1558, 44 U.S.L.W. 3754, 3755), where the court said at page 10 of the slip opinion: ". . . it is incumbent on the court in exercising its reasoned discretion to review the possible use of alternative sanctions before it composes the stringent sanctions of dismissal."

As stated by the district court in its May 20, 1973, opinion:

> "This is the fourth time in this action that CBS has moved for dismissal for failure of RCOA to answer interrogatories. On two prior occasions the Court denied the motions, without prejudice to their renewal in the event of noncompliance and on one occasion the motion to dismiss was withdrawn when RCOA at long last supplied certain limited data shortly after the motion was filed.
>
> "As more fully appears in this opinion, the Court has given every conceivable latitude to RCOA in an effort to defer and ultimately avoid the severe sanction of dismissal. However, RCOA's disdainful attitude toward the Court's orders, its interminable delay in providing any answers to relevant interrogatories, and its failure to answer fully and completely those interrogatories when it finally chose to act, compel the Court now to grant defendants' motions.
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> "The Court is not unaware of the severity of the sanction, but RCOA has been repeatedly warned that its continued refusal to comply with the Court's orders would inevitably lead to dismissal. We suspect that RCOA's treatment of the repeated orders of this Court is without precedent. [2560-61a]
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> "We recognize the cardinal principle that dismissal, being the severest of sanctions, is to be most sparingly

used. The sanction of dismissal, though its imposition is committed to our discretion, is one which should not be invoked 'precipitately or rashly.' . . .

"In the light of the history of this case, we have certainly not acted 'precipitately or rashly'.

"We are acutely aware that the sanction of dismissal is permanent and fatal to RCOA's claim and that it must always be 'tempered by the careful exercise of judicial discretion to assure that its imposition is merited.' [Citing case.] Mindful of these cautions, the Court has, in the exercise of discretion, repeatedly and patiently denied the various motions to dismiss previously filed in these actions, time after time giving RCOA additional opportunity to comply with the outstanding discovery orders.

"On the other hand, it is noted that dismissals pursuant to Rule 37 have been upheld in circumstances far less egregious than those involved here. [Citing cases.]

"It is well recognized, and the reason therefor is amply demonstrated in these cases, that dismissal for failure to provide adequate discovery 'is particularly appropriate in complex antitrust litigation like that now before the Court where efficient and effective discovery procedures are essential to orderly adjudication.' [Citing cases.]

"In the *Professional Hockey* case, it appears that plaintiffs had also failed to answer interrogatories relating to the nature and amount of their alleged damages, although, in contrast, there only seventeen months had passed after the filing of the interrogatories. Here, RCOA has had nearly four years to file adequate answers, and to comply with the repeated and outstanding orders of this Court. RCOA has repeatedly benefited by the Court's patience, but in so doing has frustrated the orderly progress of the judicial process and has finally brought upon itself the extreme consequence of dismissal.

"The burdens imposed upon the defendants' resources during the intervening years, the repeated hearings before the Court, the continued arguments over substantially the same or similar issues in discovery, the repeated assurances of future compliance, followed by continued failure or refusal to comply, the continued use or misuse of judicial time and resources and the undesirable congestion of court calendars and dockets compel the conclusion here reached.

"RCOA contends initially (pp. 5-11 of RCOA's Memorandum in Opposition to Motion to Dismiss) that its answers are sufficient to show that RCOA will be able to sustain its burden of proof at trial with respect to its measure of damages, and that, therefore, the answers provided are not deficient. RCOA, however, has failed to meet defendants' assertion that, in order to sustain its burden of proving that the exclusive licenses *caused* injury, RCOA must show that its cost of acquiring finished records was higher than would have been the case had RCOA been able to obtain records pursuant to licenses. This burden necessarily involves a comparison between RCOA's true cost of obtaining records and CBS's cost for obtaining the same records. Notwithstanding years of litigation and days of argument and/or hearing, we have been unable to reach the point of comparison.

"It is, moreover, undisputed by RCOA that the information sought is relevant and is necessary for

defendants to prepare for trial. [Citing cases.] Although RCOA argues that it suffices to introduce at trial evidence only of RCOA's aggregate costs of obtaining unspecified records, defendants certainly have a basic interest in developing and presenting and the right to develop and present to a jury accurate facts surrounding the question whether the phonograph records obtained by RCOA were the same records CBS allegedly obtained at a lower price by license. RCOA's answers are wholly insufficient to provide that crucial information following literally years of discovery litigation.

* * *

"Were this the first time RCOA's failure had come before the Court, RCOA's financial condition might conceivably have a bearing upon the scope of any order requiring answers. It would not serve, however, to excuse a plaintiff from providing any information at all. However, on this record of repeated disobedience to the Court's orders and prolonged delay in providing any responsive information during a long period involving no financial distress, RCOA's present and most recent financial condition cannot excuse its continuing non-compliance. It is abundantly clear to the Court that RCOA is solely responsible for the position in which it now finds itself. At no time before the entry of the Court's orders of October 22, 1971, November 17, 1972, and November 1, 1974, did RCOA suggest that it was unable for any reason to answer the interrogatories. On the contrary, RCOA's consistent position has been that the information could be and would be obtained from its books and records, and that it was simply a matter of undertaking the task of compiling the data, a burden RCOA had initially attempted to place on defendants." [2569a-74a]

D. *The finding of the district court that default of RCOA in producing the requested discovery was willful is not clearly erroneous.*

The district court stated in its May 20, 1975, Memorandum:

> "The Court finds that RCOA's present inability, if such it be, to answer defendants' interrogatories is due solely to RCOA's past willful disregard for the orders of this Court. RCOA's present state of insolvency cannot excuse non-compliance with the order originally entered October 22, 1971, reiterated thirteen months later on November 17, 1972, and once more directed two years later on November 1, 1974. To hold otherwise would countenance a contumacious course of conduct which has already delayed the resolution of this litigation beyond all reasonable bounds and would further, irretrievably prejudice defendants in their defense of the action. RCOA's legal position is not the result of its present or recent financial condition. It is the result of its continued refusal or neglect to meet the burden of discovery properly resting upon it in litigation voluntarily instituted by it. RCOA has never been obliged to involuntarily assume the burdens placed upon the defendants in this protracted and complex litigation. It has long sought to frustrate the defendants in discovery properly sought by them." [2575-76a]

At another point in its Memorandum, the district court quoted from *DiGregorio* v. *First Rediscount Corp.*, 506 F.

2d 781 (3d Cir. 1974), at 788, these words: "[A] pattern of conduct in flagrant disregard both of the general rules of discovery and of a specific court order . . . is 'mirrored in the record'" and stated "a similar pattern of conduct by RCOA is evident on this record" [2575a].

We have concluded that the May 1975 Memorandum contains a sufficient finding of willfulness and fault to satisfy the standard in *In re Professional Hockey Anti-Trust Litigation, supra,* and that the finding is not clearly erroneous.

E. *There was no violation of due process of law in the district court's reaching its finding of willful disobedience of the district court discovery orders.*

The record supports the requirements of the Supreme Court of the United States in *Societe Internationale* v. *Rogers,* 357 U. S. 197, 212 (1958), for dismissal under F. R. Civ. P. 37 as follows:

> ". . . Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."

This court has held that, even where there is no specific finding of willfulness as opposed to the specific findings here quoted under E at pages 19-20 above, dismissal of the action under F. R. Civ. P. 37 was not an abuse of discretion. See *DiGregorio* v. *First Rediscount Corp., supra*

at 788; *Mangano* v. *American Radiator & Standard Sanitary Corp.,* 438 F. 2d 1187, 1188 (3d Cir. 1971).

It is noted that the district court held a lengthy hearing (2157a-2357a) on August 27, 1974, followed by oral argument on September 24, 1974 (2364a-2369a) concerning the failure of plaintiff to answer the cost interrogatories.

Here, the district court found that RCOA had no valid excuse for failing to provide adequate and responsive answers to defendants' interrogatories, and that RCOA had "willfully disobeyed" the orders of the court over a four-year period (2569a).

That the district court failed to hold a hearing specifically on the issue of willfulness does not, in these circumstances, constitute a violation of due process. An evidentiary hearing would have added little to the voluminous record which the court fully considered, as is its obligation, in making its finding. The court stated in its Memorandum:

> "The Court has on at least three occasions given RCOA a full hearing regarding its failure to answer these interrogatories, including a day of testimony on August 27, 1974. 'Due process' has already led us down this long trail of briefs, reply briefs, supplemental briefs, affidavits, reply affidavits, oral argument, hearings, testimony and counter-testimony. Indeed, considering the burden, financial and otherwise, which that long journey has placed upon the defendants, 'due process' and the cause of justice dictate that *that* trail shall end here." (2574a, n. 11)

II. *The A & M and Kinney Cases (Nos. 75-2002 and 75-1812)*

In June 1970, RCOA brought a second action, in the Southern District of New York, against A & M Records

(A & M) and several other companies engaged in the manufacture and distribution of records and tapes.[19] CBS was named as a co-conspirator. With the exception of the Clayton Act § 7 claim, the complaint alleged the same antitrust and trade regulation violations asserted in the CBS case.[20] (197-228a).

On January 20, 1971, pursuant to 28 U. S. C. § 1407[21] the Judicial Panel on Multidistrict Litigation transferred

[19] A & M Records; A & M General Corp.; Irving Music, Inc.; Herb Alpert; Jerome Moss; Chess Producing Co.; Caedmon Records Inc.; R. D. Cortina Co.; Cortina Institute for Language Study; Disneyland Records; Walt Disney Productions; Wonderland Music Co.; Elektra Corporation; Elektra Records Corporation; Elektra Sales Corporation; Transamerica Corp.; Liberty/AU Distributing Corp.; Metro-Goldwyn-Mayer, Inc.; Metro Records Distributors, Inc.; Monument Records Corporation; Talmadge Productions Inc.; Roulette Records Inc.; Scepter Records, Inc.; Spoken Arts, Inc.; Skye Recording Co.; Campbell Silver Corp.; White Whale Record Co., Inc.; Word Incorporated. Only A & M; Caedmon Records, Inc.; Elektra Sales Corporation; Elektra Corporation; R. D. Cortina, Inc. and Cortina Institute for Language Study remain in this appeal.

[20] The Section 5 FTC claim was subsequently dismissed (645a). Count III, based on Sections 2(a) and 2(f) of the Robinson-Patman Act was also dismissed (1195a). See also footnote 2 above.

[21] 28 U. S. C. § 1407 provides in pertinent part:

> "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. . . .
>
> "(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. . . ."

the action to the Eastern District of Pennsylvania for "coordinated or consolidated pretrial proceedings" with the CBS case, in recognition that transfer was "likely to produce a substantial savings of time and effort for court and counsel . . . [and] that [r]ulings by [the district court] in the discovery area may also be applicable to the [A & M] case." *In re CBS Licensing Antitrust Litigation,* 328 F. Supp. 511, 512 (JPML 1971).

On November 19, 1971, RCOA filed a third action, also in the Southern District of New York, against Kinney Services, Inc. and its record sales subsidiary, Warner-Elektra-Atlantic Distribution Corporation (hereinafter referred to collectively as "Kinney").

The complaint alleges that Kinney's acquisition of Warner Bros., Elektra and Atlantic Records and the exclusionary and reciprocal trade agreements the acquired companies entered into with Kinney and other unnamed co-conspirators constituted violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act (612-630a).

Subsequently on April 19, 1972, the Judicial Panel on Multidistrict Litigation ordered transfer of the Kinney action to the Eastern District of Pennsylvania "for pretrial proceedings" with the CBS and A & M cases. *In re CBS Licensing Antitrust Litigation,* 342 F. Supp. 1177 (JPML 1972). In so doing, the panel stated:

> "The central subject of the complaint is still Record Club's alleged inability to obtain licenses to manufacture and sell phonograph records and tapes, forcing it to purchase finished records and tapes at higher prices than its club competitors and putting it at a competitive disadvantage in the club market. . . .

"Any inquiry into these allegations will cover factual issues common to the earlier actions."

Id. at 1178.

In the fall of 1972, A & M and Kinney joined CBS in its initial motion to dismiss, alleging in support that:

"The interrogatories which plaintiff has refused to answer concern the fundamental issues not only in the *CBS* and *A&M* cases but in the *Kinney* case as well, namely, cost, conspiracy and damages."

(884-885a). Up until this time, neither A & M nor Kinney had served interrogatories on RCOA.

After the CBS motion to dismiss was denied, Kinney, on January 8, 1973, served RCOA with its set of interrogatories and request for documents. The interrogatories pertinent to this appeal are Nos. 16(g) which sought RCOA's separate annual purchases for records and tapes from each of the defendants for the years 1967 through 1973, 16(i), which sought the same information with regard to purchases made from co-conspirators, and 35(d) which sought RCOA's per unit cost for records and tapes for each year since 1967 (973, 1049a).

RCOA filed answers to the Kinney interrogatories on February 22, and 28, 1973 (949, 1071a). With regard to interrogatories Nos. 16(g) and (i), RCOA responded that the information requested was contained in its purchasing records which, pursuant to Rule 33(c) RCOA offered to make available. In addition, RCOA stated that it was compiling a "summary" of these records with which it would supplement its answers in the future (975a). As to No. 35(d), RCOA responded: "OBJECTION-CONFIDENTIAL" (1050a).[22]

In an attempt to get the "general idea of the nature of plaintiff's cost records," Kinney sent a lawyer to review RCOA's documents (2155a). The lawyer was told that when the work necessary to answer the interrogatories was completed, RCOA would give Kinney access to its answers (2156a).

On March 20, 1973, RCOA filed with the court "Plaintiff's Application for Entry of an Order Providing For Coordination of Discovery." Thereafter on April 11, 1973, the court entered the following order:

"That all testimony, documents, or other information (hereinafter 'discovery') taken or produced in any action now coordinated for pre-trial proceedings before the United States District Court for the Eastern District of Pennsylvania under the style 'CBS licensing antitrust litigation (MDL No. 59)' (hereinafter 'coordinated actions') shall be deemed taken or produced in each such action, subject to the provisions of this [confidentiality] stipulation, provided that nothing herein shall be deemed to preclude any

[22] On July 19, 1973, Kinney moved the court to dismiss the complaint, or, alternatively, to compel RCOA to answer certain of the interrogatories regarding defendants' alleged conspiracies, exclusionary agreements, and their anticompetitive effect, which were previously answered by RCOA in an "evasive," "inadequate," and "incomplete" manner (1224-1260a). Kinney did not challenge the cost interrogatories [Nos. 16(g), 16(i), and 35(d)] in its motion to compel on the belief that RCOA would supply it with the "summary" it was preparing (2155a). After hearing, the court, on December 11, 1973 and January 25, 1974, ordered Kinney's motion to compel with regard to several of the challenged interrogatories (1524, 1530a). RCOA filed its answers, pursuant to the orders, on March 6, 1974 (1584a).

> party from taking whatever discovery it deems necessary for the preparation or trial of any of these coordinated actions."

(1188-1189a).

On March 11, 1974, A & M served on RCOA its third set of interrogatories (1584a).[23] Interrogatories Nos. 1-4 were substantially similar to the CBS interrogatories which sought cost information with regard to records and tapes distributed to RCOA members. They differed from the CBS interrogatories in that they asked for cost information regarding RCOA transactions after 1969 in addition to transactions occurring during the years 1961 through 1969.

RCOA proffered its answers to the A & M "cost" interrogatories on May 7, 1974 (1681a) and May 15, 1974 (1692a). Therein, RCOA stated that the information sought as to transactions occurring from 1961-1969 had already been provided to counsel for CBS. As to transactions occurring after 1969, RCOA offered to make its business records available for inspection pursuant to Rule 33(c).

On July 18, 1974, A & M and Kinney moved the court to dismiss the actions, or in the alternative, to compel further answers to the above-mentioned interrogatories, or to issue an order precluding the introduction of evidence (1954-1955a). The basis for the motion was "plaintiff's willful failure to answer defendants' interrogatories . . .

[23] A & M had served RCOA with its first set of interrogatories on January 29, 1973 (939a), to which RCOA responded on March 23, 1973 (1141a). A second set was prepared and served on RCOA March 19, 1973 (1125a). Answers were made on April 3, 1973 (1173a). The interrogatories concerned information not relevant to this appeal.

which are, in large part, a carbon copy of interrogatories which this court twice ordered plaintiff to answer in the companion CBS case" (1958a). Many of the same arguments advanced by CBS in its June, 1974 motion to dismiss, were adopted by A & M and Kinney in support (1959-1966a).

On November 1, 1974, the court issued an order, separate from its order of that date in the CBS case, compelling RCOA to make further answers to the A & M and Kinney interrogatories. It further ordered that:

> "[D]efendant's motions to dismiss this action or for an order precluding certain evidence at trial are DENIED without prejudice to their renewal in the event that supplemental answers are not filed within sixty (60) days from the date of this order."

(2389a). This order was subsequently amended to provide an extension until January 7, 1975.

RCOA met the court's deadline with respect to the Kinney interrogatories. The answers to the interrogatories were prefaced by the following:

> "Plaintiff is unable at this time to supplement fully the indicated interrogatories within the time frame of December 30, 1974 extended to January 7, 1975 by further order of the Court. The requested information is contained in thousands of documents and is not computerized. . . ."

(2429a). As to interrogatories Nos. 16(i) and 35(d) RCOA additionally stated:

> "[P]laintiff respectfully refers to its responses to interrogatories previously filed with this Court in these

> coordinated proceedings, in particular the computer price study filed in response to the interrogatories of the CBS defendants, which by order of this Court is deemed discovery taken herein."

(2431a).

RCOA did not file supplementary answers to the A & M interrogatories.

In response to RCOA's motion to stay proceedings on the basis of its bankruptcy petition, A & M and Kinney, on January 30, 1975, cross-moved to dismiss the actions on the ground that RCOA had failed to comply with discovery requests and with the order of the district court dated November 1, 1974 (2471a). A supporting affidavit also alleged:

> "Since the interrogatories in *A&M* overlap with the interrogatories in *CBS* for the period 1961-69, RCOA's failure to serve adequate answers in *CBS* is an additional ground for dismissal of the *A&M* action herein."

(2474*a).

As stated above the actions were dismissed with prejudice by court order on May 20, 1975.

The same grounds for appeal raised by RCOA in the CBS case are asserted in the A & M case.

In the Kinney case, RCOA asserts that the district court erred in (1) ordering further answers to interrogatories Nos. 16(g), 16(i) and 35(d) since it improperly rejected RCOA's reliance on Rule 33(c); and (2) in dismissing the Kinney action since, as RCOA claims, it did not willfully disobey the court's November 1974 discovery order; the answers served by RCOA were in substantial compliance

with the court's November 1974 order, and it was error in ordering dismissal to rely on RCOA's alleged failures to comply with prior discovery orders in the CBS and A & M cases.

The imposition of sanctions under Rule 37(b) relates solely to situations in which the court has made an order to provide discovery which a party has failed to obey. 4A Moore's Federal Practice ¶37.03[2].

In ordering dismissal of the A & M and Kinney cases, the district court relied on RCOA's willful disobedience of the "orders" of the court requiring answers to the challenged interrogatories. A review of the district court record, however, reveals that only one discovery order of significance to the ruling on dismissal, dated November 1, 1974, was issued in the A & M and Kinney cases.

We therefore are presented with the question, raised by RCOA, of whether it was proper for the district court, in ruling on the motion to dismiss in the A & M and Kinney cases, to rely upon RCOA's failure to comply with the prior discovery orders in the CBS case, in addition to RCOA's failure to comply with the discovery order in the A & M and Kinney actions.

Initially, it must be stated that no formal order of the Multidistrict Panel or of the district court expressly made all prior discovery orders in CBS applicable to the A & M and Kinney actions.

The Multidistrict Panel's decision transferring the A & M case to the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings with CBS did, however, suggest that the district court's "[r]ulings" in the "discovery area" might be applicable to the A & M case. Likewise, its later decision transferring the Kinney action contemplated similarity of treatment regarding inquiries into "factual issues common to the earlier actions."

Nonetheless, the possibilities expressed by the Panel were not determinative of the manner and effect of discovery conducted during the pretrial proceedings, for that judicial purpose belongs to the transferee judge. In *In Re Equity Funding Corporation of America Securities Litigation,* 375 F. Supp. 1378, 1384 (JPML 1974), it was held:

> "The statute speaks in terms of transfer to 'any district for coordinated or consolidated pretrial proceedings.' 28 U.S.C. § 1407(a). Used in the disjuctive [sic], the critical words denote different judicial functions. They are indicative of the flexibility and resourcefulness implicit in the legislation. They were undoubtedly intended to confer on a transferee judge the power to fashion the discovery program to accommodate the different facets and nuances of the litigation. It is the province of the Panel to decide whether in the first instance the litigation should be *transferred* for coordinated or consolidated pretrial proceedings. It is the province of the transferee judge to determine whether and to what extent the pretrial proceedings should be coordinated or consolidated. We have repeatedly declined to attempt to determine in what way and to what extent the litigation should be coordinated or consolidated. From the very beginning we have left that determination to the discretion of the transferee judge."

Here, the scope of discovery coordination was delineated by the district court in its April 1973 order directing that all discovery taken or produced in the CBS case be deemed taken or produced in the A & M and Kinney cases as well.[24]

[24] It is also to be noted that even prior to the April 1973 coordination order, the district court did fashion discovery orders

The Manual for Complex Litigation recommends that following the adoption of coordination of pretrial proceedings those procedures applicable to "consolidation" of complex pretrial litigation should be employed. Part 1, 5.23. Through consolidation, the purpose of which is to "avoid unnecessary effort, costs and delays, . . . rulings in all related cases can often be made at one time in one document . . ." Part 1, 5.02. With respect to subsequently transferred cases the Manual states, "the court can provide by order that the earlier discovery shall be considered accomplished in the later cases . . ." Part 1, 3.11.

Coordination of discovery, then, has as its base function, the avoidance of duplication. It also contemplates the unification of any legal rulings with respect to discovery. In this light, we hold that the district court's April 1973 coordination order was intended to make all prior and future discovery orders in the CBS case, unless otherwise necessary, applicable to the A & M and Kinney actions. It is highly illogical to assume that a legal ruling judging the adequacy of answers to certain interrogatories, which are deemed available to all parties in the CBS, A & M and Kinney actions, and orders compelling further answers to those interrogatories, should not apply equally to all of the parties.[25]

with the purpose of relying on prior discovery. The orders discussed in n. 22, *supra,* contain the language "defendant['s] . . . motion to compel further answers to interrogatories . . . is GRANTED to the extent that said information can be obtained from the coordinated discovery in the related actions . . . (1521-1523a, 1530-1532a).

[25] It is clear that the district court had the power to enter judgment of dismissal of these two actions under F. R. Civ. P. 37 and 41 even though they had been transferred from the United

Further, the fact that the district court issued a separate order on November 1, 1974 in the A & M and Kinney cases, does not diminish the effect of the district court's coordination order. The separate order was necessary to compel further answers to interrogatories not posed by CBS, namely those interrogatories seeking cost information regarding the years 1970-1973. The separate order took into account the differences in facts sought to be developed in the transferred A & M and Kinney actions. See *Southern Railway Company* v. *Templar*, 463 F. 2d 967, 971 (10th Cir. 1972).

As earlier stated, the previous orders of the district court requiring supplementation of answers submitted by RCOA in response to the CBS interrogatories were proper. Since A & M and Kinney had to rely on the answers to these CBS interrogatories in the cases against them and the answers made by RCOA to the similar A & M and Kinney interrogatories were, in large part, the same as those made to CBS, we deem justified the district court's reliance on RCOA's disobedience of those orders in directing dismissal in the A & M and Kinney actions. Additional support for the district court's dismissal order is found in RCOA's failure to adhere to the November 1, 1974 discovery order, which RCOA totally disregarded with respect to the A & M interrogatories and displayed less than substantial compliance with regard to the Kinney interrogatories.

States District Court for the Southern District of New York. See *Humphreys* v. *Tann*, 487 F. 2d 666, 667 and 670 (6th Cir. 1973); *Reidinger* v. *Trans World Airlines, Inc.*, 463 F. 2d 1017, 1018 n. 2 (6th Cir. 1972).

For all of the foregoing reasons the May 20, 1975 order of the district court in the A & M and Kinney actions will be affirmed.

AFFIRMED.

TO THE CLERK OF THE COURT:

Please file the foregoing opinion.

.....

United States Circuit Judge

Appendix C

Excerpt from Prager & Fenton examination of the books and records of Record Club of America, Inc., dated June 27, 1974.

(See Opposite) ☞

PRAGER AND FENTON
CERTIFIED PUBLIC ACCOUNTANTS
NEW YORK · LOS ANGELES · LONDON

JOSEPH FENTON, C.P.A.
LEONARD SPITALNIK, C.P.A.
LEO STRAUSS JR., C.P.A.
ABRAHAM KAHANER, C.P.A.
ROBERT MARGOLIES, C.P.A.
ROBERT BANDMAN, C.P.A.

122 EAST 42ND STREET
NEW YORK, N.Y. 10017
(212) 687-8444

EXHIBIT C

June 27, 1974

Polydor Incorporated
1700 Broadway
New York, New York 10019

Gentlemen:

Pursuant to our engagement, we have examined the books and records of

RECORD CLUB OF AMERICA, INC.
(hereafter referred to as RCOA)

for the purpose of ascertaining areas of underpayment, if any, and their extent with respect to royalty accountings rendered to

POLYDOR INCORPORATED

The period covered by this report is from October 15, 1972 to September 30, 1973.

The amount due, as set forth in this report and, where appropriate, in the attached schedules is $110,027.88, subject to the comments set forth below.

The examination was made in the light of an Agreement dated October 15, 1972, between Record Club of America, Inc. and Polydor Incorporated.

Necessary interpretations with respect to this Agreement were made by your counsel.

iness purpose for maintaining such reserves. Royalties due thereon aggregate $380.94 on units treated as sold by RCOA. We have not determined royalties on "free" records shipped, inasmuch as the quantities reflected in Schedule 1 are based on actual quarterly activity before adjustment for reserves.

Sales Under 25 Units

RCOA failed to pay royalties on those records which enjoyed sales of less than 25 units in a three month period. We were informed that the reason for this is that RCOA had probably purchased finished product rather than pressing such small quantities. Substantiation of this contention was not supplied. It is also possible that such small sales may have been made from pre-existing inventory. Accordingly, we have determined royalties due on such sales as set forth in Schedule 3 which aggregates $541.71.

Unaccounted Production

We have examined, extensively, the movement of a group of records for a six month test period, in an effort to reconcile inventory and production data to units shipped. The seven record sample utilized in this test represented in excess of 55% of total shipments of your product during the test period, and, therefore, in our opinion, constituted a meaningful sample. We determined that 28.08% of unit production was unaccounted for, as set forth in Exhibit "C". No allowance has been made for defective records in this computation, inasmuch as many such records are sold to employees at reduced rates. Based upon information supplied by RCOA which was not verified by us, defective records are only approximately 1.3% of shipments. Royalties due you on unaccounted production aggregate $27,708.16 as set forth in Schedule 4,

EXHIBIT "C"

POLYDOR INCORPORATED

RE: RECORD CLUB OF AMERICA, INC.

UNACCOUNTED PRODUCTION

DECEMBER 31, 1972 TO JUNE 30, 1973

Label	Catalog No.	Inventory 12/31/72	Purchases	Quantity Available	Inventory 6/30/73	Derived Units Shipped	Shipments Per Royalty Run: Sales	Shipments Per Royalty Run: Free	Total Shipped	Units Unaccounted
Polyd	3502	2,592	9,927	12,519	980	11,539	4,527	6,171	10,698	841
Polyd	3503	1,972	28,613	30,585	3,837	26,748	10,244	11,876	22,120	4,628
Polyd	5027	495	21,600	22,095	1,787	20,308	670	15,921	16,591	3,717
Polyd	5036	—	6,100	6,100	100	6,000	305	2,922	3,227	2,773
Deugr	2530-309	—	2,000	2,000	1,854	146	3	121	124	22
Polyd	5019	—	7,350	7,350	84	7,266	626	3,199	3,825	3,441
Sprin	5704	—	1,000	1,000	—	1,000	41	375	416	584
Total		5,059	76,590	81,649	8,642	73,007	16,416	40,585	57,001	16,006

Percentage Unaccounted Production (57,001 : 16,006) 28.08%

Note:- No trans-shipments to RCOC on above numbers

Appendix D

Excerpt from Prager & Fenton examination of the books and records of Record Club of America, Inc., dated November 16, 1974.

(See Opposite) ☞

PRAGER AND FENTON
CERTIFIED PUBLIC ACCOUNTANTS
NEW YORK · LOS ANGELES · LONDON

JOSEPH FENTON, C.P.A.
LEONARD SPITALNIK, C.P.A.
LEO STRAUSS, JR., C.P.A.
ALBERT KAHANER, C.P.A.
ROBERT MARGOLIES, C.P.A.
ROBERT BANDMAN, C.P.A.

122 EAST 42ND STREET
NEW YORK, N.Y. 10017
(212) 687-5444

EXHIBIT D

November 16, 1974

Bell Records
1776 Broadway
New York, N.Y. 10019

Gentlemen:

Pursuant to our engagement, we have examined the books and records of

RECORD CLUB OF AMERICA, INC.
(hereafter referred to as RCOA)

for the purpose of ascertaining areas of underpayment, if any, and their extent with respect to royalty accountings rendered to

BELL RECORDS
A DIVISION OF COLUMBIA PICTURES INDUSTRIES, INC.
(hereafter referred to as Bell)

The period covered by this report is from June 8, 1971 to March 31, 1974, except where otherwise indicated.

The amount due, as set forth in this report and, where appropriate, in the attached schedules is $419,335.38 subject to the comments set forth below.

The examination was made in the light of an Agreement dated June 8, 1971, as well as a Letter of Amendment dated June 10, 1971, between RCOA and Bell.

Necessary interpretations with respect to this Agreement were made by your counsel and by Mr. Allan Cohen.

Sales Under 25 Units

RCOA failed to pay royalties on those records which enjoyed sales of less than 25 units in a three month period. We were informed that the reason for this is that RCOA had probably purchased finished product rather than pressing such small quantities. Substantiation of this contention was not supplied. It is also possible that such small sales may have been made from pre-existing inventory. We have determined royalties due on such sales as set forth in Schedule 4 which aggregates $656.86. Inasmuch as this practice took place for periods subsequent to January 1, 1972, Schedule 4 reflects units only for such periods.

Unaccounted Production

We have examined, extensively, the movement of a group of records for a six month test period, in an effort to reconcile inventory and production data to units shipped. The eleven record sample utilized in this test represented in excess of 42% of total shipments of your product during the test period and, therefore, in our opinion, constituted a meaningful sample. We determined that 23.44% of unit production was unaccounted for, as set forth in Exhibit "D". No allowance has been made in this computation for the issuance of replacement records, more fully discussed in the "General Comments" section of this report. RCOA's bookkeeping records did not provide data to enable us to estimate the extent of this practice which would also appear to be subject to royalties. No allowance has been made for defective records, inasmuch as many such records are sold to employees at reduced rates. Based upon information supplied by RCOA which was not verified by us, defective records are only approximately 1.3% of shipments. Royalties due you on unaccounted production from January 1, 1972 to March 31, 1974 aggregate $115,087.25 as set forth in Schedule 5, based on the assumption that the entire difference represents distribution subject to royalties. In connection with this, we again call your attention to activity which is not reflected in royalties as set forth above in the "General Comments" section of this report.

Unaccounted Production - General Ledger Analysis

Prior to 1972, RCOA reflected unit sales in royalty accountings based on units produced, as adjusted by inventory changes, and reduced by "free" shipments (as determined by RCOA). By utilizing RCOA's general ledger cost of sales amounts and dividing by average unit costs, we compiled production units to be accounted for in a six month test period ended December 31, 1971. This analysis revealed that 8.43% of production units were not accounted for in RCOA's shipment records. We have determined royalties due you from this source in the amount of $5,205.94, as set forth in Schedule 6.

Excess Artist Royalties

The Agreement provides that RCOA shall pay an excess royalty for all artists to whom you are required to pay a royalty rate in excess of 4% of 90% of the base price. For periods prior to July 1, 1972, RCOA's accountings failed to reflect such excess. Royalties due you from this source, based on units reported as sold by RCOA, amount to $3,587.08 as detailed in Schedule 7.

Average rates utilized in this report were based on RCOA's accountings and, therefore, are understated to the extent that they do not reflect omitted excess artist royalties in periods prior to July 1, 1972. Accordingly, a portion of the amount due as set forth in Schedule 5 (Unaccounted Production), and the entire amounts due as set forth in Schedule 3 (Sales - Sliding Scale Membership), Schedule 4 (Sales Under 25 Units) and Schedule 6 (Unaccounted Production - General Ledger Analysis) are understated. Based upon appropriate tests, we have determined that approximately $6,100.00 is due because of such understatements.

SCHEDULE 5

BELL RECORDS

RE: RECORD CLUB OF AMERICA, INC.

UNACCOUNTED PRODUCTION

JANUARY 1, 1972 TO MARCH 31, 1974

	Units Shipped					
Period Ended	"Free" Shipments	Allowance For "Member Get a Member" 11.83% (Exhibit "B")	Sales (Exhibit "A")	Total	Average Royalty Rates (Exhibit "A")	Amount
4/1/72	122,159	(14,451)	26,419	134,127	$.4854	$ 65,105.25
6/30/72	89,703	(10,612)	24,995	104,086	.4626	48,150.18
9/23/72	88,229	(10,437)	20,704	98,496	.5150	50,725.44
12/30/72	95,265	(11,270)	18,716	102,711	.5339	54,837.40
4/7/73	88,520	(10,472)	25,159	103,207	.5294	54,637.79
6/30/73	92,317	(10,921)	17,136	98,532	.5206	51,295.76
9/30/73	78,688	(9,309)	13,904	83,283	.5428	45,206.01
12/31/73	109,997	(13,013)	22,344	119,328	.5315	63,422.83
3/31/74	107,248	(12,687)	15,311	109,872	.5243	57,605.89
	872,126	(103,172)	184,683	953,642		$490,986.55

Percentage of Units Unaccounted (Exhibit "D") 23.44

ROYALTIES DUE $115,087.25

SCHEDULE 6

BELL RECORDS

RE: RECORD CLUB OF AMERICA, INC.

UNACCOUNTED PRODUCTION - GENERAL LEDGER ANALYSIS

JUNE 8, 1971 TO DECEMBER 31, 1971

	Records		Tapes		Total Units
Inventory - 7/1/71		$ 714,628		$ 203,890	
Cost - 7/1/71 - 9/18/71	$ 696,371		$ 225,156		
9/19/71 - 12/25/71	1,356,664	2,053,035	292,274	517,430	
		2,767,663		721,320	
Less: Inventory - 12/25/71		1,277,640		287,734	
Cost of Goods Sold		1,490,023		433,586	
Divided by Estimated Cost Per Collated Unit		$.43		$.75	
Units Shipped		3,465,170		578,115	4,043,285
Units Shipped Per Royalty Summary					
Sales - 7/1/71 - 9/18/71				276,215	
Sales - 9/19/71 - 12/25/71				556,088	
"Free" Shipments - 7/1/71 - 9/18/71				1,131,036	
"Free" Shipments - 9/19/71 - 12/25/71				1,415,641	
Approximate Number of Units - Album Packages				350,000	3,728,980
Units Unaccounted During Test Period					314,305
Percentage of Sales Unaccounted During Test Period (Carried Forward)					8.43%

EXHIBIT "D"

BELL RECORDS

RE: RECORD CLUB OF AMERICA, INC.

PERCENTAGE UNACCOUNTED PRODUCTION

JULY 1, 1973 TO DECEMBER 31, 1973

Catalog No.	Physical Inventory 6/30/73	Purchases	Physical Inventory 12/31/73	Derived Units Shipped	Shipments per Royalty Run		Total Shipped	Units Unaccounted
					Sales	"Free"		
Bell 1106	4,960	15,880	1,295	19,545	1,133	18,247	19,380	165
BIGTR 2013	2,404	10,891	41	13,254	1,231	10,429	11,660	1,594
Bell 1102	4,163	9,587	2,343	11,407	2,348	6,280	8,628	2,779
Bell 1118	689	12,125	861	11,953	1,241	9,849	11,090	863
Bell 1112	7,935	11,486	3,326	16,095	1,924	8,590	10,514	5,581
Bell 1120	5,470	12,740	9,736	8,474	2,139	5,882	8,021	453
Bell 1116	12,896	4,774	5,027	12,643	1,666	9,889	11,555	1,088
Bell 1300	992	11,746	1,132	11,606	417	5,055) 2)	5,474	6,132
BIGTR 2101		7,303	3,345	3,958	211	1,259	1,470	2,488
Bell 6081	350	2,950	247	3,053	1,065	1,551	2,616	437
Bell 6071	1,597	3,200	19	4,778	742	3,441	4,183	595
Total	41,456	102,682	27,372	116,766	14,117	80,474	94,591	22,175

Percentage of Units Unaccounted to Total Units Shipped 23.44